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IN THE

Supreme Court of the United States

APRIL TERM

No. 79-3606

JESSIE STANSBERRY, D/B/A
UNIVERSAL STUDIO, ET AL,
Petitioner

v.

JOHN HOLMES,
Harris County District Attorney,
and
JACK HEARD,
Sheriff of Harris County,
Each in their official capacity,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered March 17, 1980, rehearing denied April 28, 1980.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 613 Fed.2d 1285 (1980) and attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254, petitioner having challenged the constitutionality of an ordinance promulgated by Harris County, Texas.

QUESTION PRESENTED

QUESTION NUMBER ONE

Whether Sections 4(k) and 4(l) of the regulations of Harris County, Texas, for the location of certain sexually oriented commercial enterprises are unconstitutionally vague and in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

Upon presentation of Petitioners' original complaint, the Hon. John V. Singleton, United States District Judge, Southern District of Texas, issued a restraining order. A hearing was scheduled for October 26, 1979, at which time Appellees and Appellants put on evidence concerning the Regulations. After hearing evidence and reviewing the pleadings and briefs submitted, the District Court entered an order holding that Sections 4(k) and 4(l) of the Regulations of Harris County, Texas for certain sexually oriented commercial enterprises violate the due process component of the Fourteenth Amendment of the

United States Constitution. The basis for the District Court's order was that Section 4(l)'s definition of sexually oriented commercial enterprises was vague and overbroad in that the county's inherent police powers may be used to harass perfectly legitimate commercial enterprises which engage in activities that might sexually stimulate their patrons. Judge Singleton further stated that Section 4(k), which provides the definition of the term "school," does not provide certainty as to its definition and thus is unconstitutionally vague. Respondents gave notice of appeal and urged the Fifth Circuit to reverse the decision of the District Court.

On Appeal, the Fifth Circuit Court held that the Regulation was Constitutional and disagreed with the District Court in that portions of the act, specifically Section 4(k) and 4(l), were not vague and that the definition provided by the ordinance was "sufficiently clear and provided adequate warning of the prescribed conduct." Rehearing was denied; however, the Court modified its opinion by adding a footnote.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In its original complaint Petitioner attacked the constitutionality of both the enabling act, V.A.T.S. Article 2372w, and the Harris County Regulation as being unconstitutionally vague and in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The District Court ruled on Petitioners behalf. The United States Court of Appeals for the Fifth Circuit reversed the decision of the District Court, holding that the definitions in the ordinance were not vague.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Texas Law: Texas Civil Statutes, Article 2372w and the regulations of Harris County, Texas for the location of certain sexually oriented commercial enterprises which the appeals court included as Appendix A and Appendix B of its original opinion and are included as such in Appendix A of this petition.

STATEMENT

On May 17, 1979, V.A.T.S. Article 2372w, hereafter referred to as the Act was enacted by the State of Texas to permit counties and cities to enact ordinances and orders regulating the location of certain sexually oriented commercial activities. The act provided that noncompliance with any regulation adopted pursuant to it could result in penal sanctions. On August 6, 1979, the Commissioner's Court of Harris County, Texas adopted by order their Regulations of Harris County, Texas for the location of certain sexually oriented commercial enterprises, hereafter referred to as Regulations. The Regulations created penal sanctions for noncompliance with the Regulations and set October 15, 1979 as the effective date of the Regulations. On October 10, 1979, Petitioner filed suit in Federal District Court pursuant to 42 U.S.C. 1981, 1983, 1985, and 1986 and, 28 U.S.C., Secs. 1331, 1343, 2201, 2202, and 2403, seeking to enjoin enforcement of V.A.T.S., Art. 2372w and the Regulations of Harris County, Texas.

REASONS FOR GRANTING THE WRIT

Petitioners assert that this Court should grant certiorari to determine whether Sections 4(k) and 4(l) of the ordinance promulgated by Harris County, are unconstitutional pursuant to the Fifth and Fourteenth Amendments to the United States Constitution. In determining whether or not the ordinance is unconstitutionally vague this Court should not view the ordinance in terms of a zoning restriction placed by a local legislative body. In accordance with the Fifth Circuit's decision, the local legislative bodies could use zoning as a means of exercising control over private property. Note, Developments in the Law—Zoning, 91 Harv. L. Rev. 1427, 1429 (1978). The Fifth Circuit noted that with the rapid development of a highly urban industrial society, the importance of zoning as a form of land use control has increased. The past decade has seen a growing popular acceptance of the notion that infinite uncontrolled growth often produces the unsightly sprawl that threatens to turn every major street into a neon commercial carnival. Justice Powell recognized these same principles in his concurring opinion in *Young v. American Mini-Theatres, Inc., et al,* 427 U.S. 50, 74 (1976), in the power of local municipalities to utilize the novel controls of land use regulation in order to meet effectively the increasing encroachment of urbanization upon the quality of life of its citizens. However, in ascertaining the measure of authority or power of the Harris County Municipal Courts to regulate and adopt zoning procedures, and interpret the constitutionality of the contested ordinance, this Court should recognize that in Houston and Harris County, Texas there is no uniform zoning ordinance throughout the city. As noted in the Harvard Law Review article, Houston, Texas is one of

the only cities with a population of over 250,000 that has not enacted any zoning ordinances. Consequently, the authority of Harris County must be viewed in terms of the actual statute itself and not in terms of the authority of a legislative body to zone. See Note, Developments in the Law—Zoning, supra, 1427, 1439.

Thereby, since the violation of the regulations can result in a criminal prosecution, Petitioner asserts that the regulation must be couched in terms precise enough to give fair notice of the conduct constituting the criminal violation in order to meet the requirements of due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.[1] *Rabe v. Washington,* 405 U.S. 313 (1972).

Petitioners assert that the Regulations do not satisfy such requirements as the acts which are forbidden by the Statute and are so vague and indefinite that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application. See *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972); *Grayned v. City of Rockford,* 408 U.S. 104 (1972); *Smith v. Goguen,* 415 U.S. 566 (1974); *Cramp v. Board of Public Instruction of Orange County, Florida,* 368 U.S. 278 (1961); *United States v. Harris,* 347 U.S. 612 (1954).

In *Smith v. Goguen,* the Supreme Court specifically stated:

> The (due process) doctrine (of vagueness) incorporates notions of fair notice or warning. More-

1. A violation of the Regulations subjects the offender to punishment for a Class B misdemeanor which provides a maximum punishment of a $1,000.00 fine and/or confinement in jail for a term not to exceed 180 days.

> over, it requires legislatures to set reasonable clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement . . . Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislature may not so abdicate responsibility for setting a standard for criminal law. (415 U.S. at 572, 575).

Petitioners assert that the Regulations are vague and fail to describe what is meant by "major business" of the establishment. In conjunction with the lack of a definition, it implies that the businesses are intended to provide for the sexual stimulation or sexual gratification of their customers.

Contrary to the Fifth Circuit's decision, the concept of "major business" was not defined by the ordinance. Thereby, it is possible that a person could be prosecuted if ten percent (10%), forty percent (40%) or sixty percent (60%) of their business could be "intended to provide sexual stimulation or sexual gratification." Consequently, Petitioners assert that such a vague concept of "major business" could tend to allow for the arbitrary and capricious enforcement of the act by county authorities.

Section 4(1) defines sexually oriented commercial enterprises as

> a massage parlor, a nude studio, modeling studio, love parlor, or any similar commercial enterprise whose major business is the offering of a service which is intended to provide sexual stimulation or sexual gratification to the customer.

Petitioner asserts that this section of the regulation is so vague and overbroad in its sweep that the counties police power may be used to harass perfectly legitimate commercial enterprises engaged in activities that may sexually stimulate their patrons. The Regulations fail to define such important terms as massage parlor, nude studio, modeling studio and love parlor. This act does not specify whether the regulations apply to those businesses that have one of those terms in its name. Thereby,

> This ordinance is void of vagueness, both in the sense that it fails to give a person of ordinary intelligence fair notice that its contemplated conduct is prohibited by the statute and because it encourages arbitrary and erratic arrests and convictions. *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972).

Section 4(k) of the regulations defines "school" as being

> A building where persons regularly assemble for the purpose of instruction, together with playgrounds, dormitories, stadiums and other structures or grounds used in conjunction therewith.

Petitioners feel that the definition as stated is unclear as to whether this section means schools where children attend classes daily from September to May, or all buildings where information of any type is disseminated. For example,

> are karate schools, bartending schools, and buildings where Dale Carnegie courses, Tye-chi dancing or hypnotism are taught, intended to fall within the meaning of Section 4(k).

Consequently, Petitioners maintain that this definition does not provide the certainty required to uphold the constitutionality of Section 4(k). Therefore, Appellees maintain that the Regulations as adopted are unconstitutionally vague. The Regulations allow for the selective enforcement by the Respondent and thereby Petitioners assert that their right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution would be abrogated.

CONCLUSION

Petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

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Dated: Houston, Texas
May 27, 1980

CERTIFICATE OF SERVICE

I hereby certify that on this the 27th day of May, 1980, a true and correct copy of the foregoing Petition for Writ of Certiorari was delivered via certified U.S. mail, return receipt requested, to the following parties:

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STANLEY G. SCHNEIDER

APPENDIX A

Jessie STANSBERRY d/b/a Universal Studio et al.,
Plaintiffs-Appellees,

v.

John HOLMES, Harris County District Attorney,
Jack Heard, Sheriff of Harris County, Texas,
each in their official capacities,
Defendants-Appellants.

No. 79-3606.

UNITED STATES COURT OF APPEALS
Fifth Circuit.

April 28, 1980.

Appeal from the United States District Court
for the Southern District of Texas;
John V. Singleton, Jr., Judge.

AMENDED ORDER

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion 3-17-80, 5 Cir., 1980, 613 F.2d 1285).

Before TUTTLE, FAY and THOMAS A. CLARK, Circuit Judges:

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the

Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

The Court, *sua sponte,* adds the following language to footnote 10:

> We do not reach questions arising under this provision of the Constitution because since appellees prevailed on their due process claim, they did not urge this point before us. It remins open on remand to the district court.

Jessie STANSBERRY d/b/a Universal Studio et al.,
Plaintiffs-Appellees,

v.

John HOLMES, Harris County District Attorney,
Jack Heard, Sheriff of Harris County, Texas,
each in their official capacities,
Defendants-Appellants.

No. 79-3606.

UNITED STATES COURT OF APPEALS
Fifth Circuit.

March 17, 1980.

The United States District Court for the Southern District of Texas at Houston, John V. Singleton, Jr., Chief Judge, permanently enjoined enforcement of county regulations dealing with zoning of certain sexually oriented commercial enterprises. On appeal by county officers, the Court of Appeals, Tuttle, Circuit Judge, held that the regulations were not invalid as violative of constitutional rights of free speech nor were the regulations objectionable as being unconstitutionally vague and overbroad.

Judgment reversed and case remanded.

* * *

Appeal from the United States District Court
for the Southern District of Texas

Before TUTTLE, FAY and THOMAS A. CLARK, Circuit Judge.

TUTTLE, Circuit Judge:

This case involves an appeal from a district court's order permanently enjoining the enforcement of Regula-

tions §§ 4(k) and (*l*) of the Regulations of Harris County, Texas dealing with the zoning of certain sexually oriented commercial enterprises. We reverse the decision of the trial court.

For a number of years Texas municipalities have sought to regulate the location or operation of sexually oriented businesses.[1] Faced with the problem of many of those businesses moving outside city limits, in May 1979 the Texas Legislature enacted enabling acts 2372v and w authorizing the commissioners court of any county to adopt regulations in the unincorporated territory of the county governing the operation of massage establishments and the location "of massage parlors, nude studios, modeling studios, love parlors, and other similar commercial enterprises whose major business is the offering of a service which is intended to provide sexual stimulation or sexual gratification to the customer." [See Appendix A].

Pursuant to that authority, the Commissioners Court of Harris County, Texas in September 1979 adopted regulations restricting the location of certain sexually oriented commercial enterprises, to be effective in October 1979. [See Appendix B]. In part, the regulations made it unlawful for any person to operate a sexually oriented commercial enterprise without a valid permit issued by the sheriff and stated that no permit could be issued unless the applicant could show that the enterprise was at least 1500 feet from a child care facility, a church or

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1. *See, e. g., Patterson v. City of Dallas,* 355 S.W.2d 838 (Tex. Civ. App. 1962), *appeal dismissed,* 372 U.S. 251, 83 S.Ct. 873, 9 L.Ed.2d 732 (1963) (Dallas); *City of Houston v. Shober,* 362 S.W.2d 886 (Tex. Civ. App. 1962) (Houston); *Holt v. City of San Antonio,* 547 S.W.2d 715 (Tex. Civ. App. 1977) (San Antonio).

place of worship, a dwelling, public building or public park, school, hospital or a building in which alcohol was sold. A "sexually oriented commercial enterprise" was defined as a "massage parlor, nude studio, modeling studio, love parlor and any other similar commercial enterprise whose major business is the offering of a service which is intended to provide sexual stimulation or sexual gratification to the customer." The regulations specifically exempted any bookstore, movie theatre or business licensed to sell alcoholic beverages; any business operated by or employing licensed psychologists, licensed physical theapists, licensed athletic trainers, cosmetologists or barbers; or any business employing or operated by licensed physicians or licensed chiropractors.

The penalty for non-compliance with the regulation was a penal sanction, a class B misdemeanor,[2] and the operation of any such sexually oriented commercial enterprise without a permit was declared a public nuisance.

On October 10, 1979, the plaintiffs filed suit challenging the ordinance under 42 U.S.C. §§ 1981, 1983, 1985, and 1986. They charged, among other things, that the Texas Act as applied through this local ordinance constituted the taking of property without due process or compensation; that the Act and ordinance were unconstitutionally vague; and that the Act and ordinance violated the First Amendment and the Due Process Clause of the Fourteenth Amendment. The trial court granted a temporary restraining order. After a hearing on the merits, the trial court entered an order decreeing that the definitions of "school" in section 4(k) and "sexually

2. According to § 12.22 of Vernon's Texas Code Annotated-Penal (1974), a class B misdemeanor is punishable by a fine not exceeding $1,000 and a jail sentence not exceeding 180 days.

oriented commercial enterprise" in section 4(*l*)[3] were unconstitutionally vague and overbroad. Specifically, the court found that the definition of "sexually oriented commercial enterprise" could encompass such businesses as art schools and dancing studios which the court described as "perfectly legitimate commercial enterprises." The court also pointed out that the definition of "school" was unclear since the definition might apply to such enterprises as bartending or Karate schools. The trial court also stated that the regulations "possibly" violated the Fifth Amendment privilege against self-incrimination, since any people who admitted that they operated a sexually oriented commercial enterprise as defined in § 4(*l*), admitted in effect that they were violating § 43.02 of the Texas Penal Code which makes prostitution a crime.[4] The trial court therefore granted a permanent injunction prohibiting enforcement of §§ 4(k) and (*l*) of the regulations of Harris County. This appeal followed.[5]

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3. Section 4(k) states:

> "School" means a building where persons regularly assemble for the purpose of instruction or education together with the playgrounds, dormitories, stadiums, and other structures or grounds used in conjunction therewith;

Section 4(*l*) states:

> "Sexually oriented commercial enterprise" means a massage parlor, nude studio, modeling studio, love parlor and any other similar commercial enterprise whose major business is the offering of a service which is intended to provide sexual stimulation or sexual gratification to the customers.

4. Texas Penal Code § 43.02 defines the crime of prostitution as knowingly offering to engage or soliciting another to engage in an act which involves (1) contact between the genitals of one person and the mouth or anus of another person, (2) any touching of the anus or any part of the genitals of another person or the breast of a female 10 years or older with intent to arouse or gratify the sexual desire of any person or (3) penetration of the female sex organ by the male sex organ.

5. The court apparently found no merit in the other arguments of the plaintiffs. The order states that the enabling act is constitu-

The appellants assert initially that the case does not contain any First Amendment issues, but involves rather an exercise of the state's police power through zoning.[6] Since the regulations were tailored to avoid any effect on speech protected by the First Amendment, they contend that the regulations must be analyzed by the standard traditionally applied to zoning regulations—whether the regulations are arbitrary and unreasonable, having no rational relationship to a legitimate governmental interest. *See Stone v. City of Maitland,* 446 F.2d 83, 87 (5th Cir. 1971). The appellants then argue that the district court erred in holding that the definitions of "school" and "sexually oriented commercial enterprise" are vague and overbroad.

The appellees assert that the regulations are, as found by the trial court, vague and overbroad, failing to define the terms "school" and "sexually oriented commercial enterprise" so that a person of ordinary intelligence has fair notice of the conduct that is proscribed. They also contend that the regulations conflict with an individual's Fifth Amendment right against self-incrimination because of the similarity between the definition of a sexually oriented commercial enterprise and the Texas Penal Code's

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tional, and cites an opinion holding that the Harris County massage parlor regulations are a constitutional exercise of the police power. *See Magdalene Harper v. John Lindsay,* No. 77-1435 (S.D. Tex., May 31, 1978).

6. Several of the cases relied upon by the district court involved regulations affecting speech protected by the First Amendment. *See Young v. American Mini Theatres,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, *rehearing denied,* 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed. 2d 155 (1976); *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The appellants are apparently concerned that the court might apply the stricter standards applicable to cases involving protected speech.

definition of prostitution. *See* Texas Penal Code § 43.02, *supra* note 4.

I.

[1] It is important to note at the outset that the regulations in question do not attempt to zone businesses such as bookstores or movie theatres, which fall within the protection of the First Amendment. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, *rehearing denied*, 429 U.S. 813, 97 S.Ct. 191, 50 L.Ed.2d 155 (1976), the Supreme Court held that "adult" theatres may be subject to municipal zoning regulations, despite the traditional rule that expression may not be classified on the basis of content. 427 U.S. at 72-73, 96 S.Ct. at 2453. Although *Young* affords certain "speech" activities lesser protection than under traditional First Amendment principles, it nonetheless requires a more stringent review than is applicable to regulations zoning conduct not protected under the First Amendment. *See id.;* Note, Developments in the Law—Zoning, 91 Harv. L. Rev. 1427, 1560 (1978). However no First Amendment interests are at stake here; we therefore analyze the provisions by the traditional standards applicable to zoning regulations.

II.

[2] If the district court, in calling the ordinance "overbroad" and "vague" means that this ordinance is beyond the police power, it is certainly mistaken. In our age, zoning has become "the predominant technique by which governments . . . [exercise] . . . control over private property." Note, Developments in the Law—Zoning, 91 Harv. L. Rev. 1427, 1429 (1978). With

the rapid development of a highly urban and industrialized society, the importance of zoning as a form of land use control has increased. The past decade has seen a growing popular acceptance of the notion that infinite uncontrolled growth often produces the unsightly sprawl that threatens to turn every major street into a neon commercial carnival.

The Supreme Court has recognized the key role that the zoning power can play in maintaining for citizens an acceptable quality of life. Zoning is the local community's most powerful weapon against a wave of commercialism that threatens to permeate not only the major thoroughfares but the quiet residential neighborhoods with their parks, trees, and children at play. Without the power to zone, every person would be at the mercy of the entrepeneur who chose to develop on the next corner. Zoning provides one of the firmest and most basic of the rights of local control. Since 1928, the Supreme Court has never held that a zoning measure exceeded the police power.[7] In *Berman v. Parker,* 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954), the Court held that land use regulations may promote "values [which] are spiritual as well as physical, aesthetic as well as monetary." In *Village of Bele Terre v. Boraas,* 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797 (1974), the Court said that zoning could be used to create and

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7. Some might consider an exception to be *Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), a recent case which involved a city single-family ordinance which created a very limited definition of what constituted a family. The ordinance was struck down by a plurality on the grounds that it chose "to regulate the occupancy of its housing by slicing deeply into the family itself." *Id.* at 498, 97 S.Ct. at 1935. That case thus struck the statute down, not because it exceeded the police power, but because it was too narrowly drawn. *See* Developments, p. 1443.

promote living areas that protect "family values [and] youth values." Given these pronouncements and the importance of zoning as an instrument of community control over private property, this Court has decided that the proper standard of review of zoning ordinances is limited to the question "whether the action . . . is arbitrary and capricious, having no substantial relation to the general welfare." *South Gwinnett Venture v. Pruitt,* 491 F.2d 5, 7 (5th Cir. 1974), *cert. denied,* 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974). *See also, Blackman v. City of Big Sandy, Texas,* 507 F.2d 935 (5th Cir. 1975).[8] The requirements of procedural due process also must be observed,[9] and a zoning decision cannot violate the Fifth Amendment which says that "private property [shall not] be taken for public use, without just compensation."[10]

[3] In this case, the zoning measures at issue clearly overcome the "arbitrary and capricious" standard. Not only were the State of Texas and Harris County's regulations not arbitrary and capricious, they were a rational and understandable effort to deal with a perceived evil that affected living conditions in their area. Nor was the county under a "compulsion to deal with all other

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8. We do not address, of course, in this opinion recent cases that attack the clear inequities promulgated by socially or class-oriented exclusionary zoning, nor do we endorse such a narrow standard of review in such cases. For an example of the attempts of recent state courts to grapple with the issue, *see Surrick v. Zoning Hearing Bd. of U. Providence Tp.,* 476 Pa. 182, 382 A.2d 105 (1977); *Southern Burlington County NAACP v. Township of Mt. Laurel,* 67 N.J. 151, 336 A.2d 713, *appeal dismissed,* 423 U.S. 808, 96 S.Ct. 18, 46 L.Ed.2d 28 (1975).

9. *See* Note, Developments in the Law—Zoning, 91 Harv. L. Rev. 1427, 1502-1549.

10. *See Ibid.,* pp. 1462-1502.

evils that are seen to be equally serious" in the same or other ordinances to pass the test of constitutionality. *See Stone v. City of Maitland,* 446 F.2d 83, 88 (5th Cir. 1971). The county clearly had the power to make the judgment it did in this case in an attempt to insure a more aesthetic quality of life for its people.

[4-6] We also disagree with the district court's finding that the terms "school" and "sexually oriented commercial enterprise" are impermissibly vague. Any statute or ordinance which proscribes certain conduct must be sufficiently definite to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," and to avoid the possibility of arbitrary and erratic arrests and convictions. *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1971). A provision need not, however, be cast in terms that are mathematically precise; it need only give fair warning of the conduct proscribed, in light of common understanding and practices. *Grayned v. City of Rockford,* 408 U.S. 104, 110, 92 S.Ct. 2294, 2300, 33 L.Ed.2d 222 (1971); *United States v. National Dairy Products Corp.,* 372 U.S. 29, 32, 83 S.Ct. 594, 597, 9 L.Ed.2d 561 (1963); *United States v. Mikelburg,* 517 F.2d 246, 252 (5th Cir. 1975), *cert. denied,* 424 U.S. 909, 96 S.Ct. 1104, 47 L.Ed.2d 313 (1976). The district court found that the definition of "school" was vague because it could possibly include "Karate schools, bartending schools, and buildings where Dale Carnegie courses, t'ai, ch'i' dancing or hypnotism [are] taught." We disagree. The reference in the provision to "the playgrounds, dormitories, stadiums and other structures or grounds used in conjunction therewith" clearly narrows the definition to schools for pri-

mary, secondary, and college education. The definition, read as a whole, provides the necessary measure of certainty and is not unconstitutionally vague. The district court also held that section 4(*l*) defining "sexually oriented commercial enterprise" was "so vague and at the same time overbroad in its sweep that the police power might be used to harass perfectly legitimate commercial enterprises that engage in activities that may sexually stimulate the patrons or customers such as dancing studios, clubs featuring disco dancing or art schools where nude models are used." We do not agree with the trial court's reading of the definition. The definition is limited to businesses "whose *major business* is the offering of *a service which is intended* to provide sexual stimulation or sexual gratification." (Emphasis added.) By including the phrase "major business," the county commissioners have excluded businesses whose activities might incidentally cause sexual stimulation. Certainly no one would contend that the major business of an art school or dance studio was the provision of services intended for sexual gratification. Additional definiteness is provided by the fact that the section specifically list three types of regulated businesses—massage parlors, nude studios, and love parlors—and applies the definition to "any other similar commercial enterprise." We find that this definition is sufficiently clear and provides adequate warning of the proscribed conduct.

[7] The district court also noted that the regulations possibly conflict with the Fifth Amendment right against self-incrimination because of the similarity between the definition of sexually oriented commercial enterprise and prostitution. The court cites *Marchetti v. United States,*

390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1967) as an indication of this conflict. In *Marchetti,* the Court held that a taxpayer could not be prosecuted for willful failure to report income from wagering, since wagering is prohibited by both state and federal law. *Id.* at 60-61, 88 S.Ct. at 709. The direct self-incrimination present in *Marchetti* is not, however, present in the instant case. The definition of "prostitution" is very narrow and specifically drawn. Although a "business whose major purpose is the provision of a service intended to provide sexual stimulation or gratification" would certainly include prostitution, the two are not synonymous. The definition in section 4(*l*) encompasses a much broader range of conduct. Thus, application for a permit under these regulations would in no way constitute an admission that an individual was engaged in prostitution.

The judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX A

An Act

relating to the authority of cities and counties to regulate the location of certain sexually oriented commercial activities; providing penalties.

Be it enacted by the Legislature of the State of Texas:

Section 1. (a) The legislature finds that the unrestricted location of certain sexually oriented commercial enterprises may be detrimental to the public health, safety, and welfare by contributing to the decline of residential

and business neighborhoods and the growth of criminal activity. The purpose of this Act is to provide local governments a means of remedying this problem.

(b) This Act neither enhances nor diminishes the authority of local governments to regulate commercial enterprises covered by this Act with regard to matters other than their location.

Sec. 2. In this Act "city" means an incorporated city, town, or village and includes a home-rule city.

Sec. 3. (a) A city by ordinance or a county by order of the commissioners court may adopt regulations restricting the location of massage parlors, nude studios, modeling studios, love parlors, and other similar commercial enterprises whose major business is the offering of a service which is intended to provide sexual stimulation or sexual gratification to the customer.

(b) Nothing in this Act is intended to authorize the regulation of any bookstore, movie theatre, or business licensed to sell alcoholic beverages, nor does it authorize regulation of any business:

(1) operated by or employing licensed psychologists, licensed physical therapists, licensed athletic trainers, licensed cosmetologists, or licensed barbers engaged in performing functions authorized under the license held; or

(2) operated by or employing licensed physicians or licensed chiropractors engaged in practicing the healing arts.

(c) City regulations apply only inside the city's corporate limits. County regulations apply only to the parts of the county outside the corporate limits of a city.

Sec. 4. (a) Regulations adopted under this Act may restrict the location of regulated enterprises to particular areas, restrict the density of regulated enterprises, or prohibit the operation of a restricted enterprise within a certain distance of a school, regular place of religious worship, residential neighborhood, or other specified land use the governing body of the city or county finds to be inconsistent with the operation of a restricted establishment.

(b) The city or county may require the obtaining of a permit for the operation of a restricted establishment. The city or county may charge a fee for the permit, but the fee may not exceed the actual cost of processing the permit application.

(c) A city that has in effect a comprehensive zoning ordinance adopted under Chapter 283, Acts of the 40th Legislature, Regular Session, 1927, as amended (Article 1011a, et seq., Vernon's Texas Civil Statutes), must comply with all applicable procedural requirements of that statute in adopting regulations under this Act within the scope of that statute.

Sec. 5. (a) A city or county may sue in the district court to enjoin the violation of a regulation adopted under this Act.

(b) Violation of a county regulation adopted under this Act is a Class B misdemeanor.

(c) In a city that has a comprehensive zoning ordinance as described in Subsection (c), Section 4, of this Act, a violation of an ordinance adopted under this Act is punishable by the same penalty prescribed for a violation of the zoning ordinance. In all other cities, violation

of an ordinance adopted under this Act is a Class B misdemeanor.

Sec. 6. This Act does not legalize anything prohibited under the Penal Code or other state law.

Sec. 7. If any provision of this Act or its application to any person or circumstances is held invalid for any reason, the invalidity does not affect any other provision or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Sec. 8. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

APPENDIX B

REGULATIONS OF HARRIS COUNTY, TEXAS FOR THE LOCATION OF CERTAIN SEXUALLY ORIENTED COMMERCIAL ENTERPRISES

Section 1. *Authority*

These Regulations are adopted by the Commissioners' Court of Harris County, Texas, acting in its capacity as the governing body of Harris County, Texas. Authority of Harris County to adopt these Regulations is House Bill No. 654, enacted by the 66th Legislature of the State of Texas and signed by the Governor on or about May 17, 1979.

Section 2. *Administration*

The Commissioners' Court hereby designates the Sheriff to inspect and issue permits pursuant to the above authority. The administration of these Regulations including but not limited to issuance of permits and inspections hereunder, shall be performed by the Sheriff or his duly authorized deputy. Any peace officer certified by the State of Texas may enforce these Regulations.

Section 3. *Area Covered By Regulations*

These Regulations apply only to the parts of the county outside the corporate limits of a city.

Section 4. *Definitions*

As used in these Regulations:

(a) "Commissioners' Court" means the Commissioners' Court of Harris County, Texas;

(b) "County" means Harris County, Texas;

(c) "Church or place of religious worship" means a building in which persons regularly assemble for worship, intended primarily for purposes connected with faith, or for propagating a particular form of belief;

(d) "Child Care Facility" means a building used as a day nursery, children's boarding home, child placing agency or other place for the care or custody of children under fifteen years of age, licensed by the State of Texas pursuant to Article 4442a, Vernon's Texas Civil Statutes;

(e) "Dwelling" means a house, duplex, apartment,

townhouse, condominium, mobile home or any other building used for residential purposes;

(f) "Hospital" means a building used to provide health services for human in-patient medical care for the sick or injured licensed pursuant to the Texas Hospital Licensing Law (Article 4437f Vernon's Texas Civil Statutes) or operated by an agency of the federal government, or a convalescent facility licensed pursuant to Article 4442c, Vernon's Texas Civil Statutes;

(g) "Person" means an individual, partnership, corporation, or other entity;

(h) "Public Building" means a building used by federal, state, or local government and open to the general public;

(i) "Public Park" means a tract of land maintained by the federal, state, or local government for the recreation and enjoyment of the general public;

(j) "Regulations" means Regulations of Harris County, Texas, for the Location of Certain Sexually Oriented Commercial Enterprises;

(k) "School" means a building where persons regularly assemble for the purpose of instruction or education together with the playgrounds, dormitories, stadiums, and other structures or grounds used in conjunction therewith;

(*l*) "Sexually Oriented Commercial Enterprise" means a massage parlor, nude studio, modeling studio, love parlor and any other similar commercial enterprise whose major business is the offering of a

service which is intended to provide sexual stimulation or sexual gratification to the customer;

(m) "Sheriff" means the Sheriff of Harris County, Texas;

(n) "State" means the State of Texas;

(*o*) "City" means an incorporated city, town, or village and includes a home-rule city.

Section 5. *Bookstores, etc. Excepted*

These Regulations do not apply to the following:

(a) Any bookstore, movie theatre, or business licensed to sell alcoholic beverages;

(b) Any business, operated by or employing licensed psychologists, licensed physical therapists, licensed athletic trainers, licensed cosmetologists, or licensed barbers performing functions authorized under the license held;

(c) Any business operated by or employing licensed physicians or licensed chiropractors engaged in practicing the healing arts.

Section 6. *Permit Required*

(a) It shall be unlawful for any person to own or operate a Sexually Oriented Commercial Enterprise at a location in the parts of the County outside the corporate limits of a city without a valid permit issued therefor by the Sheriff in accordance with the provisions of these Regulations.

(b) Before the issuance of a permit, the applicant must certify that the proposed Sexually Oriented

Commercial Enterprise will be located a minimum of 1500 feet from the following, which the Commissioners' Court hereby finds to be inconsistent with the operation of a restricted establishment, to-wit:

(1) A child care facility;

(2) A church or place of religious worship;

(3) A dwelling;

(4) A hospital;

(5) A building in which alcoholic beverages are sold;

(6) A public building;

(7) A public park;

(8) A school.

(c) Subsection (b) of this Section 6 will apply to all Sexually Oriented Commercial Enterprises regardless of whether or not existing on the effective date of these Regulations. However, should any Court determine that such requirement is unconstitutional or invalid insofar as it applies to Sexually Oriented Commercial Enterprises existing on the effective date of these Regulations, then and in that event, the applicant may certify that the Sexually Oriented Commercial Enterprise was in existence on the effective date of these Regulations in lieu of making the certification provided for in said Subsection (b). Provided, however, that any permit issued on the basis of an application making a certification pursuant to this subsection (c) in lieu of certification under subsection (b) shall

have written thereon "This permit is valid for only one (1) year from October 1, 1979."

(d) For the purposes of this section, measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used by the restricted establishment to the nearest portion of the building, structure, or facility set forth in subsection (b).

Section 7. *Permit Displayed*

A Sexually Oriented Commercial Enterprise permit issued under these Regulations shall be displayed at all times in an open and conspicuous place in the restricted establishment for which it was issued.

Section 8. *Permit Application*

Any person desiring a Sexually Oriented Commercial Enterprise permit shall file a written application with the Sheriff on a form to be prescribed by him.

(a) The application shall set forth the following:

(1) The name of the applicant and whether the applicant is an individual, general partnership, limited partnership, corporation or other entity;

(2) The name under which the restricted establishment is to be operated and a general description of the service to be provided;

(3) The address and a full legal description of the parcel of land on which the restricted establishment is to be located;

(4) The name, residence address and telephone number, if any, of the manager or other individual to be principally in charge of the operation of the restricted establishment;

(5) Written declaration that the information contained in the application is true and correct, said declaration being duly dated and signed in the County. If the applicant is an individual, the application shall be signed and sworn to by the applicant. If the applicant is a partnership, the application shall be signed and sworn to by a partner thereof. If the applicant is a corporation or other entity, the application shall be signed and sworn to by an authorized officer of such corporation or entity.

(b) The application shall be accompanied by the following:

(1) A tender of the correct permit fee as hereinafter provided;

(2) A certified copy of the assumed name certificate filed in compliance with the Assumed Business or Professional Name Act (Vernon's Texas Codes Annotated, Business and Commerce Code, Chapter 36) if the applicant is to operate the restricted establishment under an assumed name;

(3) A certified copy of the article of incorporation, together with all amendments thereto, if applicant is a Texas Corporation;

(4) A certified copy of the certificate of authority to transact business in this State, together with all amendments thereto, if applicant is a foreign corporation;

(5) A certified copy of the certificate of limited partnership, together with all amendments thereto, filed in the Office of the Secretary of State under The Texas Limited Partnership Act (Article 6132a, Vernon's Texas Civil Statutes), if the applicant is a limited partnership formed under the laws of Texas;

(6) A certified copy of the certificate of limited partnership and the qualification documents, together with all amendments thereto, filed in the office of the Secretary of State under the Texas Limited Partnership Act, if the applicant is a foreign limited partnership.

Section 9. *Investigation by Sheriff*

Upon receiving the application for a Sexually Oriented Commercial Enterprise permit, the Sheriff shall caused to be conducted an investigation for the purpose of determining whether or not such premises comply with the location requirements as set forth in these Regulations.

Section 10. *Issuance of Sexually Oriented Commercial Enterprise Permit*

(a) Any permit required by these Regulations shall be issued and signed by the Sheriff or his duly authorized deputy.

(b) The Sheriff shall issue a Sexually Oriented Com-

mercial Enterprise permit within thirty (30) days of receipt of the application unless he finds that:

(1) The correct permit fee has not been tendered to the Sheriff;

(2) The operation as proposed by the application is prohibited by law;

(3) The applicant has made any false, misleading or fraudulent statement of fact in the permit application or in any document required by these Regulations to accompany the application;

(4) The application or the establishment location does not meet all requirements of these Regulations.

Section 11. *Fees*

To defray the actual cost of processing the Sexually Oriented Commercial Enterprise permit application, the permit fee shall be One Hundred ($100.00) Dollars.

Section 12. *Return of Fee*

No portion of any fee collected under these Regulations shall be returned after a permit has been issued or refused.

Section 13. *Transfer Prohibited*

A Sexually Oriented Commercial Enterprise permit is not transferable, assignable or divisible.

Section 14. *Permit Valid for Specified Location*

Each permit issued under these Regulations shall be valid at the location therein specified, and not otherwise.

Section 15. *Obtaining Permit by Fraud*

It shall be unlawful for any person to knowingly make any false, fraudulent or untruthful statement, either written or oral, or in any way knowingly to conceal any material fact, or to give or use any assumed name or fictitious name other than one duly filed for record in compliance with the Assumed Business or Professional Name Act (Vernon's Texas Codes Annotated, Business and Commerce Code, Chapter 36).

Section 16. *Fraudulent Use of Permit of Another*

It shall be unlawful for any person to use a Sexually Oriented Commercial Enterprise permit which has been issued to another person.

Section 17. *Counterfeiting, Changing, Defacing Permit*

It shall be unlawful for any person to counterfeit, forge, change, deface, or alter a Sexually Oriented Commercial Enterprise permit.

Section 18. *Misdemeanor*

Violation of any provision of these Regulations is a Class B misdemeanor.

Section 19. *Nuisance*

The operation of a Sexually Oriented Commercial Enterprise without a Sexually Oriented Commercial Enterprise Permit is hereby declared to be a public nuisance.

Section 20. *Injunction*

The County may sue in District Court to enjoin the violation of any provision of these Regulations.

Section 21. *Effect on State Law*

These Regulations do not legalize anything prohibited under the Penal Code or other State Law.

Section 22. *Severability*

If any provision of these Regulations or its application to any person or circumstances is held invalid for any reasons, the invalidity does not affect any other provisions or application of these Regulations which can be given effect without the invalid provision or application, and to this end the provisions of these Regulations are declared to be severable.

Section 23. *Effective Date*

These Regulations shall become effective on the fifteenth day of October, 1979.

Supreme Court, U.S.
FILED
SEP 22 1980
MICHAEL RODAK, JR. CLERK

NO. 79-1878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JESSIE STANSBERRY, D/B/A
UNIVERSAL STUDIO, ET AL,
Petitioners

v.

JOHN HOLMES,
Harris County District Attorney,
and
JACK HEARD,
Sheriff of Harris County, Texas
Each in their official capacity,
Respondents

RESPONDENT OFFICERS' BRIEF

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and
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Sheriff of Harris County, Texas
Each in their official capacity,
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RESPONDENT OFFICERS' BRIEF

BACKGROUND

To The Honorable Court:

This case involves the constitutionality of Article 2372w, Vernons Texas Civil Statutes. Said law empowers the governing body of Harris County, Texas and other municipalities to enact regulations concerning "sexually oriented commercial enterprises." The Harris County

Commissioners Court, pursuant to the statute, timely enacted such regulations and the constitutionality of said regulations are also in issue herein. Harris County, Texas is a large county even by Texas standards and contains almost 2000 square miles. The County Seat is Houston, Texas (The nation's fourth largest city) and the County contains a number of other municipalities, some of which are quite large (Pasadena, Texas 150,000 population, Baytown, Texas 60,000 population, etc.). As set forth in the subject statute and evidence, the Regulations apply only in the *unincorporated* portions of Harris County, and such area is still quite rural in many respects, though approximately 500,000 persons reside therein. The unincorporated area covers several hundred square miles. The full texts of the statute and regulations in dispute are contained in the appendix to this brief. The trial court sustained the validity of the germane statute and all of the regulations, enacted pursuant thereto, except Sections 4(k) and 4(l) thereof. This ruling rendered the Regulations unenforceable because the definition of a "sexually oriented commercial enterprise" was knocked out. The Defendant Sheriff and District Attorney proved unequivocally in trial that there are many areas in the unincorporated parts of Harris County, Texas where the plaintiffs' sex business can locate other than within 1500 feet of residences, schools and churches, etc. In fact, said sex businesses at this time can remove to any incorporated city in Harris County or outside of the County for that matter so long as said businesses comply with the relevant zoning ordinances or other land use controls extant in the subject jurisdictions.

It should be noted near the threshold of this case that lack of general "zoning" in the City of Houston, Texas,

as opposed to the *unincorporated* area of Harris County is not relevant to this cause. It is also common knowledge locally that the City of Houston has a number of significant land use controls which impact the cancerous growth of urban blight in meaningful ways. The same is true of the *unincorporated* areas of Harris County, Texas. To the extent that the "Harvard Law Review article" referred to by Plaintiffs-Petitioners infers otherwise said article is in gross factual error and is not evidence before this Court.

In 1976 Harris County Officials became aware of local problems previously experienced in other portions of the country concerning public promotion of prostitution under various guises. At that time nearly all of the "establishments" operating locally were doing so under what had become public code words for prostitution, such as "massage parlor," "spa," "bath," etc., together with associated wordings indicating that the business offered females for various specified pleasures, stopping just short of advertising patently unlawful prostitution. At that time, offers to "massage" dominated the representations made by the establishments so the Texas Legislature, .in 1977, responded with the passage of Article 2372v, V.A.C.S., which mandated regulation of massage parlors. The Fifth Circuit's opinion in this case at bar is erroneous as to the date of passage of that law. It should be stated here parenthetically that many arrests for prostitution were being made by undercover police officers throughout the County at the subject establishments. However, felony promotion charges could not be made against the operators and owners because visits to their businesses were infrequent during open hours. The fines and attorneys fees for the prostitutes became, as usual, just part of the business

overhead. It was believed, and rightfully so, that civil regulation of the arguably "legal" front businesses would aid in the general problems confronted, such as the severe urban blight and damaging nuisances.

Besides the fact that the businesses were mere fronts for prostitution, the physical plants of the establishments were always garish, and taking the sort of provocative advertising used, constituted grave urban blight of the worst sort. Most of the establishments located themselves in or near residential areas that were technically not restricted or zoned solely to residential use. This resulted in such filthy sites being located near churches, schools, residential neighborhoods, legitimate, and clean, businesses, etc. In some cases the sites were literally next door to churches and single family dwellings. In addition to prostitution, the establishments generated drug arrests and proved to be crime vectors in other respects. As shown in the trial record, the primary neighborhoods involved are near the Houston Intercontinental Airport. The Airport locale generates a considerable traveling clientele for the sex businesses.

Historically, the State of Texas has addressed the problem as herein set forth. Article 2372v, V.A.T.S., authorized the County Commissioners Courts in the State to regulate massage parlors. It was enacted by the 65th Legislature, effective *May 25, 1977*. Pursuant thereto the Harris County Commissioners Court after public hearings, adopted comprehensive Massage Parlor Regulations on *July 21, 1977*, with enforcement to begin on *September 1, 1977*. On *August 21, 1977*, 22 massage parlors filed suit in the local Federal District Court to enjoin the enforcement of the Regulations. On *August*

31, 1977, and on *September 20, 1977,* the Federal District Court issued injunctions halting all enforcement of the Regulations until the Court could make a final decision on the validity of the Regulations. On *May 31, 1978,* the Federal District Court finally ruled that the *Massage Parlor* Regulations were valid, with the exception of one part thereof, and the injunction was dissolved against their enforcement. The massage parlors appealed to the 5th Circuit and that case was finally disposed of on *May 9, 1980,* in favor of law enforcement, *Harper, et al v. Judge Jon Lindsay,* 616 F.2d 849 (5th Circuit, 1980, no writ history). The police had been enjoined for *9 months* during 1978 in that important case, while the miscreants devised strategies to evade meaningful regulation.

Thereupon, in mid 1978, the nearly 40 "massage parlors" in Harris County decided to elude the effective regulations by abandoning the "massage parlor" front businesses. Most or all of the front businesses became "Nude Modeling Studios" or some variation thereof, but the basic character of the physical plants did not change. In fact, the signs became more garish and sometimes involved huge naked female sign-statues, 10 to 15 feet tall. This probably seemed humorous to some, but not to those who lived near the sleazy, filthy degenerate dumps or attended church or school near them.

Police records indicate that such front establishments engendered other crime, generally related to drugs, assaults and disorderly conduct. The neighborhoods affected suffered reductions in value due to the urban blight of these establishments, that were, as stated above, largely concentrated for competitive purposes around the Houston Intercontinental Airport and nearby residential areas.

In reaction to the new strategy of the front businesses, the 66th Texas Legislature enacted Article 2372w, V.A.C.S., which allowed counties and cities in Texas to regulate all *sexually oriented enterprises.* This new law, at issue herein, was effective on *May 17, 1979* and the Commissioners Court of Harris County, after public hearings, adopted, on *September 6, 1979,* its new Regulations for the location of *Sexually Oriented Commercial Enterprises.* The new Regulations had a broader ambit than previous law and became effective on October 15, 1979. On *October 10, 1979,* several Nude Modeling Studios, admitting to be sexually oriented businesses, under oath, filed suit in Federal District Court to enjoin the Sheriff and District Attorney from enforcing the new Regulations. The Court, on October 11, 1979, enjoined the Sheriff and District Attorney from enforcing the Regulations and set a trial date for October 23, 1979. The trial on the merits took place on October 23, 1979, and on *October 26, 1979,* Judge Singleton issued a permanent injunction by final judgment against the Sheriff and District Attorney, effectively enjoining said officers from enforcing the regulations. The County Attorney's Office immediately appealed to the 5th Circuit Court of Appeals in New Orleans.

Shortly after the injunction issued, the County Attorney also attempted to have the 5th Circuit grant an *immediate* stay of the injunction to allow fast enforcement, but this was refused by the Circuit.

In November of 1979, various acts of violence started taking place at some of the Nude Modeling Studios. About a year prior to this violence, there had been a

number of arson cases at the studios, where competing owners had attempted to burn each other out of business. The new violence proved to be far worse than arson. Two prostitutes were murdered and there were other serious acts of brutality. These facts were brought to the attention of the 5th Circuit and an expedited schedule of the appeal was adopted by the Circuit, culminating in oral arguments of the case in New Orleans on *December 13, 1979,* before a Three Judge Panel. Finally, on *March 17, 1980,* the 5th Circuit *reversed* Judge Singleton's ruling. The Nude Modeling Studios moved for a rehearing, but on *April 28, 1980,* the 5th Circuit denied the motion.

Though the Circuit's decision was rendered on *March 17, 1980,* under the law of the Circuit had to allow the losing side to move for rehearing. As stated above, that was overruled on *April 28, 1980.* That Court still had to issue its official mandate and judgment, however, and that was finally done on *June 3, 1980,* and said judgment ordered Judge Singleton to take all action "not inconsistent with this opinion." The Circuit also denied the Nude Modeling Studios' motion for a stay of its ruling pending appeal to the U. S. Supreme Court.

On *June 6, 1980,* when the County Attorney received a copy of the judgment and mandate from the Circuit, said office filed in Judge Singleton's court a Motion to *Dissolve* the Injunction still outstanding against the Sheriff and District Attorney. Judge Singleton took said Motion under advisement and was supposed to have decided it on *June 23, 1980.* However, the attorney for the Studios asked for an extension of time to furnish a brief to the Court on all points of law. The County Attorney accused the Studios of using stalling tactics, but Judge Singleton

gave the Studios until *August 4, 1980,* to have their brief into the Court. On August 5, 1980, the County Attorney received the Modeling Studios' brief, and on that same day filed a counter brief.

As of the date of this Brief, September 22, 1980, Judge Singleton still has the matter under advisement *and has refused* as of said date, *to obey the 5th Circuit's mandate and judgment.* The Sheriff and District Attorney will be wrongfully enjoined from enforcement until they are released by Judge Singleton. Such wrongful inaction is tantamount to an illegal stay of mandate.

The particular sex establishments involved at bar are "Models Galore," "Models Galore II," "Fountain of Youth," "Joys Modeling," "Hollywood Modeling Studio," "Tokyo Oriental," and "Houston House." The undisputed evidence at trial included video tape, color photographs, etc., and related testimony patently indicating the issues of public health, safety and morals at stake herein. The prostitution convictions at a number of the plaintiff establishments clearly show such sex establishments to be crime vectors.

Respondents totally agree with the 5th Circuit's Opinion herein except that we do not agree that the Trial Court did not reach or consider various 5th Amendment issues. Under the law, all relief not specifically granted in trial was denied. Said issues were argued and briefed in trial, and no relief was granted thereon based upon the law and evidence adduced.

LIST OF ISSUES

I.

THE GENERAL POLICE POWER OF THE STATE OF TEXAS IN CONNECTION WITH LAND USE REGULATIONS AND THE ISSUE OF ALLEGED TAKING OF PROPERTY.

II.

THE DEFINITIONS CONTAINED IN SECTIONS 4(k) AND 4(l) OF THE SUBJECT REGULATIONS ARE NOT VAGUE IN THAT FAIR NOTICE IS GIVEN OF THE CONDUCT PROSCRIBED.

III.

THE FIFTH AMENDMENT IS NOT AN ISSUE IN THAT A PERMIT IS REQUIRED ONLY FOR THE ARGUABLY LEGAL ENTERPRISES SET FORTH IN THE REGULATIONS.

ARGUMENT

I.

THE GENERAL POLICE POWER OF THE STATE OF TEXAS IN CONNECTION WITH LAND USE REGULATIONS AND THE ISSUE OF ALLEGED TAKING OF PROPERTY.

This issue may be the most important at bar because it permeates the case. Though the Trial Court below explained its ruling primarily in terms of "overbroadness" or "vagueness" the essential fault found with the defini-

tion of "school" is that in its opinion the section is facially arbitrary and capricious.

We choose to make our case on this issue by quoting highly germane, recent decisions in the field. The case at bar truly *does not* contain any first Amendment issues. In *Young v. American Mini Theaters, Inc.*, 96 S.Ct. 2440, 2454 and 2452, 2453 it was stated as follows.

> "Mr. Justice Powell, concurring . . .
>
> "One-half century ago this Court broadly sustained the power of local municipalities to utilize the then relatively novel concept of land-use regulation in order to meet effectively the increasing encroachments of urbanization upon the quality of life of their citizens. Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). The Court there noted the very practical consideration underlying the necessity for such power. "[W]ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities." Id., at 386-387, 47 S.Ct., at 118. The Court also laid out the general boundaries within which the zoning power may operate: Restrictions upon the free use of private land must find their justifications in "some aspect of the police power, asserted for the public welfare"; *the legitimacy of any particular restriction must be judged with reference to all of the surrounding circumstances and conditions; and the legislative judgment is to control in cases in which the validity of a particular zoning regulation is "fairly debatable."* Id., at 387, 47 S.Ct. at 118. In the intervening years zoning has become an accepted necessity in our increasingly urbanized society, and the types of zoning restrictions have taken on forms

far more complex and innovative than the ordinance involved in Euclid. In Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), we considered an unsual regulation enacted by a small Long Island community in an apparent effort to avoid some of the unpleasantness of urban living. It restricted land used within the village to single-family dwellings and defined "family" in such a way that no more than two unrelated persons could inhabit the same house. We upheld this ordinance, noting that desires to avoid congestion and noise from both people and vehicles were "legitimate guidelines in a land use project addressed to *family needs*" and that it was quite within the village's power to "make the area a sanctuary for people." Id., at 9, 94 S.Ct., at 1541.

II.

Against this background of precedent, it is clear beyond question that the Detroit Common Council had broad regulatory power to deal with the problem that prompted enactment of the Anti-Skid Row Orinance. As the Court notes, ante, at 2444, and n.6, the Council was motivated by its perception that the "regulated uses," when concentrated, worked a "deleterious effect upon the adjacent areas" and could "contribute to the blighting or downgrading of the surrounding neighborhood." The purpose of preventing the deterioration of commercial neighborhoods was certainly within the concept of the public welfare that defines the limits of the police power. See Berman v. Parker, 348 U.S. 26, 32-33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954). *Young v. American Mini Theaters, Inc.,* 96 S.Ct. 2440. Page 2454. (emphasis added)

"Mr. Justice Stevens delivered the Opinion for the Court in the same case, in part, as follows:

"But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

The remaining question is *whether the line drawn by these ordinances* is justified by the *city's interest in preserving the character of its neighborhoods.* On this question we agree with the views expressed by District Judges Kennedy and Gubow. The record disclosed a factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect. *It is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas.* In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. *Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.*

Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures. We hold that the zoning ordinances requiring that adult motion picture theaters not be located within 1,000 feet of two other regulated uses does not violate the Equal Protection Clause of the Fourteenth Amendment. The judgment of the Court of Appeals is Reversed." *Young v. American Mini Theaters,* 96 S.Ct. 2440, Pages 2452-2453. (Emphasis added)

The constitutional inhibition against taking private property for public use without compensation has reference solely to eminent domain matters and the legal equivalent thereof or in other words, governmental "takings" of property. Recently, the Honorable United States Supreme Court once again quite *narrowly defined* what a "taking" is in the context of governmental land use controls or zoning.

"Agins v. City of Tiburon
100 S.Ct. 2138
(June 10, 1980)

"Mr. Justice Powell:

". . . The appellants [landowners] contended that the city had completely destroyed the value of the property for any purpose whatsoever . . ."

". . . In this case, the zoning ordinance substantially advance legitimate governmental goals . . . They neither prevent the best use of appellant's land . . . nor extinguish a fundamental attribute of ownership . . ."

See also *Penn. Central Transp. Co. v. City of New York,* 98 S.Ct. 2646 (1978)."

A citizen has no vested right to have rules of law remain unchanged for his private benefit. *Middleton v. Texas Power & Light Co.,* 39 S.Ct. 227, 249 U.S. 152 (1919). *U.S., ex rel. Knauff v. Shaughnessey,* 338 U.S. 537, 544, 70 S.Ct. 309. *N.L.R.B. v. Edward G. Budd Co.,* 169 F.2d 571 (Sixth Circuit, 1948); *Foremans Assoc. of America v. Edward G. Budd Co.,* 355 U.S. 908 (1949), 223 F.2d 762 (8th Cir. 1955), *cert den.* 76 S.Ct. 196, rehearing den. 76 S.Ct. 301; *Bordenell v. U.S.,* 233 F.2d 120 (9th Cir. 1956).

On May 9, 1980, the Fifth Circuit authoritatively disposed of *Harper, et al v. Jon Lindsay, et al,* 616 F.2d 849, quoted in germane part as follows: [This is the massage parlor case, historically related to the cause at bar]

> "It is urged that the [Harris County Massage Parlor] regulations violate state and federal due process guarantees because they (1) *constitute an unconstitutional "taking" of vested property rights without* due process of law, (2) deprive appellants of their fundamental rights without a compelling state interest, and (3) *act in a retroactive manner.* Appellants ask us to subject these regulations to a stricter scrutiny than is usually applied to exercises of police power, on the basis that (1) the right to engage in a lawful business falls close if not within the category of fundamental rights, which must be guarded with particular solicitude, and (2) the instant regulations single out the massage parlor business for discriminatory treatment.
>
> "This court's recent decision in *Pollard v. Cockrell,* 578 F.2d 1002 (5th Cir. 1978), sets forth the standard to be applied in testing the constitutionality of massage parlor regulations. The *Pollard* court was faced with a challenge to a massage parlor regulatory scheme very similar to the Harris County regulations. It rejected the argument that the right to pursue a legitimate business was "fundamental" for purposes of equal protection analysis. "[T]he theory that classifications affecting the right to pursue a legitimate business demand strict scrutiny fly in the face of the well established rule that state regulations of business or industry are to be reviewed under the less exacting 'rational basis' standard." Id at 1012. But see *Corey v. City of Dallas,* 352 F.Supp. 977 (N.D. Tex. 1972), rev'd on other grounds 492 F.2d 496 (5th Cir. 1974). Like *Pollard,* this action neither affects fundamental rights nor invokes a

traditionally suspect classification. We therefore need only determine whether the massage parlor regulations under attack bear a rational relationship to the broad purposes underlying their enactment. The scope of our review is thus quite narrow.

"[T]he state's police power encompasses the authority to pass legislation aimed at regulating the health, welfare and morals of the community, and it is not the province of a court to weight the policy arguments in favor of or against the regulations or to determine whether the same ends could be reached through different or less onerous restrictions. Rather, the proper inquiry is whether the challenged regulations bear a rational relation to a legitimate state end; if so, they should be upheld unless they are so arbitrary or unreasonable as to be irrational. *Harper v. Lindsay,* 454 F.Supp. 597, 601 (S.D. Tex. 1978); see *Nebbia v. New York,* 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934)."

* * *

"Appellants further allege that the regulations do not afford procedural due process because section 66 does not provide for representation by an attorney, cross-examination of witnesses, jury trial, nor does it provide any guidelines for the admittance or exclusion of evidence. In response to this assertion, we note that the regulations do not expressly forbid the right to counsel, cross-examination, jury trial, etc. The regulations' silence as to the procedure to be followed does not amount to a denial of due process. See *Pollard v. Cockrell,* 578 F.2d at 1016; *Smith v. Keator,* 285 N.C. 530, 206 S.E.2d 203, appeal dismissed, 419 U.S. 1043, 95 S.Ct. 613, 42 L.Ed.2d 636 (1974)." (emphasis added)

Specifically, the Fifth Circuit said authoritatively in *Pollard* cited above: [Page 1016, 578 F.2d]

> "Sections 6A and 6B set forth the criteria for issuance of massage business permits and masseur's permits by the chief of police. *The appellants contend that these sections deny them due process of law because they do not provide for remedies in the event that a permit is denied.* Assuming that massage parlor owners and masseuses would be entitled to due process in the event a permit were denied them, *the ordinance's silence as to the procedure to be followed does not amount to a denial of due process.* Had the ordinance been drafted to *forbid* notice and a hearing, it might well have been struck down as facially unconstitutional. As enacted, the ordinance in no way prevents the city from affording whatever process is due when it denies a permit." (emphasis added)

All of the cases cited by Plaintiff's herein relating to so called "retroactive" zoning laws or business regulations are not relevant to this cause. The 5th Circuit correctly brushed aside the same or similar argument in *Harper v. Jon Lindsay, et al,* 616 F.2d 849 (May 9th 1980) cited above to this Court. Additionally, Article 2372, w., V.A.C.S., and the duly enacted regulations themselves find that the Plaintiffs' unregulated operations constitute facial nuisances and indeed are a patent threat to the health, safety, morals and welfare of Harris County's citizens. *The probative evidence adduced at trial in this regard stands uncontroverted in the record.*

Land use regulations or zoning laws can be made to apply full force to existing property or enterprises when the property or enterprises sought to be regulated constitute a public nuisance and/or a threat to the public health, morals, safety or welfare, *City of Corpus Christi v. Allen,* 254 S.W.2d 759, 761 (Texas Supreme Court),

cited by Plaintiff's herein. As stated above the graphic evidence adduced at trial, which was uncontroverted in any way, proved beyond any doubt that the sex businesses in question are destructive in myriad ways to public health, safety and morals.

The United States government did not have to "amortize" businesses' inventories of cyclamates when those chemical substances were banned. Nor did the United States government have to "amortize" the inventories of vile and obscene devices when the transportation and sale of such items were Federally outlawed some years ago. 18 U.S.C. 1461 (infra).

"Not only were the State of Texas and, Harris County's regulations not arbitrary and capricious, they were a rational and understandable effort to deal with a perceived *evil* that affected living conditions in their area." Page 3898, judgment of the 5th Circuit in this case, *Stansberry*.

In *Blackman v. City of Big Sandy*, 507 F.2d 935 (5th Cir., 1976) the Honorable Court said succinctly as follows:

> "AINSWORTH, Circuit Judge:
>
> Contending the City's action is arbitrary, discriminatory and confiscatory, appellants assert the zoning ordinance is unconstitutional as applied.
>
> This Court has noted previously that our review of zoning decisions is limited, and that in cases challenging the propriety of property classifications "[t]he *only question which federal district courts may consider is whether the action . . . is arbitrary and capricious, having no substantial relation to the general welfare.*" South Gwinnett Venture v. Pruitt, 5 Cir., 1974, 491 F.2d 5, 7 (en banc); see also

Higginbotham v. Barrett, 5 Cir., 1973, 473 F.2d 745, 747. The facts clearly establish a reasonable basis for the City's decision. Not only is one church directly across the street from the location where appellants propose to sell beer, but three other churches and a school, as well as a number of residences, are located nearby. The City might be legitimately concerned about the presence of a liquor establishment and its accompanying traffic in the midst of homes, churches and a school. The Supreme Court has recently made clear that zoning decisions "*addressed to family needs*" are permissible ones.

The police power is not confined to elimination of filth, stench, and unhealthy places. *It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion,* and clean air make the area a sanctuary for people. Village of Belle Terre v. Boraas, 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797 (1974). . . .

The contention that the ordinance is discriminatory because establishments elsewhere, including one located only two blocks from appellants' station are permitted to sell liquor is easily answered. "*A nuisance may be merely the right thing in the wrong place, like a pig in the parlor instead of the barnyard.* If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." Village of Euclid v. Amber Realty Co., 272 U.S. 365, 388 47 S.Ct. 144, 71 L.Ed. 303 (1926)." (Emphasis added)

Finally in *Stone v. City of Maitland,* 446 F.2d 83 (5th Circuit, 1971), the Court said:

"JOHN R. BROWN, Chief Judge:

Upholding the zoning code over claims that it violated the due process and equal protection clauses,

the court illustrated how such ordinances have a clear relationship to a city's efforts to protect the health and security of children, to suppress disorder, to extinguish fires, to regulate street traffic, to prevent congestion, to reduce the "danger of contagion," to facilitate police protection, to lessen the noise level and to provide a wholesome residential atmosphere to its citizens. See also Gorieb v. Fox, 1927, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228; Nectow v. City of Cambridge, 1928, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842; Washington ex rel. Seattle Title Trust Co. v. Roberge, 1928, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210; Berman v. Parker, 1954, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. Thus in testing the zoning ordinances before us here the sole question is whether there is a rational relationship between the ordinance and the promotion of some aspect of the City's police power—*a label which describes the full range of legitimate public interests.* Mayhue v. City of Plantation, Florida, 5 Cir., 1967, 375 F.2d 447, 449.

It is important to recognize exactly what the Equal Protection Clause entails. If the legislature senses an evil, it may deal with it. *At the same time it is under no compulsion to deal with all other evils that are seen to be equally serious.*

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. * * * or the reform may take one step at the time, addressing itself to the phase of the problem which seems most acute to the legislative mind. * * * The legislature may select one phase of one field and apply a remedy there, neglecting the others. * * * The prohibition of the Equal Protection

> Clause goes no further than the invidious discrimination." . . .
>
> If there are several stations of this kind in one area, which there are likely to be in a commercial district, the neighborhood soon becomes a blighted eyesore and one greatly diminished in aesthetic and commercial appeal.
>
> This Court and those in Florida have recognized that the enhancement of the aesthetic appeal of a community is a proper exercise of police power. Elliott, supra; City of Miami Beach v. Ocean & Inland Co., 1941, 147 Fla. 480, 3 So.2d 364; Merritt v. Peters, Fla., 1953, 65 So.2d 861; Sunad, Inc. v. City of Sarasota, Fla., 1960, 122 So.2d 611. For the value of scenic surroundings to tourists, prospective residents and commercial development cannot be overstated. But in an age in which the preservation of the quality of our environment has become such a national goal, a concern for aesthetics seems even more urgent. Cf. Zabel v. Tabb, supra; Note, 12 B.C.Inc. & Com. L. Rev. 674 (1971). Abandoned gas stations substantially detract from that environment, and the City was warranted in finding that the spacing requirements tend to reduce that threat. Thus the 350 yard distance requirement is constitutional. *We hold that it was for the City Fathers, not the Founding Fathers, to make the judgments on what Maitland needed to meet the urban menace of blight.* Their judgment is confirmed, and that of the Court below reversed. (Emphasis added)

The record from the District Court, including the appellees own pleadings, as well as the graphic evidence adduced, reveals the fair wisdom of the Texas Legislature and the Harris County Commissioners Court in this field.

II.

THE DEFINITIONS CONTAINED IN SECTIONS 4(k) AND 4(l) OF THE SUBJECT REGULATIONS ARE NOT VAGUE IN THAT FAIR NOTICE IS GIVEN OF THE CONDUCT PROSCRIBED.

The definitions in Section 4(k) and 4(l) of the subject Regulations found by the trial court "to violate the due process component of the Fourteenth Amendment" reads as follows:

> "Section 4(k)—'School'—means a building where persons regularly assemble for the purpose of instruction or education together with the playgrounds, dormitories, stadiums and other structures or grounds used in conjunction therewith; and
>
> Section 4(l)—'Sexually Oriented Commercial Enterprises'—means a massage parlor, nude studio, love parlor, and any other similar commercial enterprise whose major business is the offering of a service which is intended to provide sexual stimulation or sexual gratification to the customer."

Webster's New International Dictionary (2nd Ed.) unabridged, at page 288 defines "instruction" as follows:

> "1) Act, practice, or profession of one who instructs; as theory of instruction; high school instruction.
>
> 2) That which instructs or is imparted to instruct; specif. (a) Knowledge or discipline acquired by way of education; as a man of fine instruction (b) a lesson or teaching; a precept; as children should profit by the instructions of their elders * * * Syn. INSTRUCTION, TEACHING, TUITION."

Thus with the use of the words instruction or education in Section 4(k) a person of ordinary intelligence is in fact given fair notice of what a school is, including even the schools set forth in Judge Singleton's opinion.

The cases cited by the Court, *Papachristou* and *Grayned,* both Supreme Court cases, do not truly support the Judge's conclusion with respect to the subject definitions as being too vague because, with reference to *Papachristou* the vagrancy ordinance in question typifies the "catch-all" language so typically seen in such statutes to permit the police to arrest "undesirables". Clearly the Regulations in issue do not even arguably give police free rein to harass as in the cited *Papachristou* case. Unfortunately Judge Singleton ignored the true rule, to-wit "in the field of regulatory statutes governing business activities where the acts limited are in a narrow category greater leeway is allowed", *Papachristou v. City of Jacksonville,* 92 S.Ct. 839, (1972) at page 843, since the obvious purpose of our Regulations is much more confined in scope than a vagrancy statute.

In *Grayned v. City of Rockford,* 408 U.S. 102 (1972), the U.S. Supreme Court upheld an antinoise ordinance which read as follows:

> "No person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making or any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof." (Obviously, the general purpose of this ordinance and the subject Regulations are similar.)

The Court in Grayned when ruling upon the antinoise ordinance stated:

> "With that warning, we find no unconstitutional vagueness in the antinoise ordinance. Condemned to the use of words, we can never expect mathematical certainty from our language."

In footnote 15 which is noted in the quote above, the Court cites another Supreme Court case which states "It will always be true that the fertile legal imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question." *American Communications Assn. v. Douds,* 339 U.S. 382, 412, 70 S.Ct. 674, 94 L.Ed. 925 (1950).

In addition to the above several authorities we would respectfully request the Court to consider the following authorities:

> "However, a statute is not unconstitutionally vague merely because clearer and more precise language might have been used; the Constitution does not require impossible standards of statutory clarity." *United States v. Petrillo,* 332 U.S. 1, 67 S.Ct. 1838, 91 L.Ed 177 (1947).

> "[A]ll that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Roth v. United States,* 354 U.S. 476 491, 11 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).

> "The strong presumptive validity that attaches to an Act . . . has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States v. National Dairy Products Corp.,* 372 U.S. 29, 32, 83 S.Ct. 594, 9 L.Ed.2d 591 (1963).

Furthermore,

> "[i]n the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed." *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

In *Boyce Motor Lines v. United States,* 342, U.S. 337, 340, 72 S.Ct. 329, 96 L.Ed. 367 (1952), the Court in holding that the words "so far as practicable and where feasible" are not so vague and indefinite as to make the standard of guilt conjectural, stated that:

> "[a] criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, *most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions.* Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." (Emphasis added)

Thus, in light of the above authorities and particularly Webster's definition of instruction, the term "school" as used in Section 4(k) is neither unconstitutionally vague on its face nor legally too vague to give the fair notice required by the Fourteenth Amendment.

As stated above, the definition for Sexually Oriented Commercial Enterprises was also found to be unconstitutionally vague by the District Court. With respect to this ruling we would rely on the authorities quoted supra as well as the further authorities which follow.

In a case previously cited, *United States v. National Dairy Products Corp.*, 83 S.Ct. 594 (1963), the Supreme Court in addressing the void for vagueness doctrine states:

> "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. United States v. Harris, 347 U.S. 612, 617, 74 S.C. 808, 811, 98 L.Ed. 989 (1954). In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged. *Robinson v. United States,* 324 U.S. 282, 65 S.Ct. 666, 89 L.Ed. 944 (1945).

Once again we would urge that the definitions contained in the "Regulations" are sufficient to provide one with a reasonable understanding of what contemplated conduct is proscribed.

The Supreme Court, speaking to still another aspect of the vagueness doctrine in *United States v. Petrillo,* 332 U.S. 1 (1947), stated as follows:

> "We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular

> fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. *Robinson v. United States,* 324 U.S. 282, 285, 286, 89 L.Ed. 944, 946, 947, 65 S.Ct. 666.

In a more recent case, *Jordan v. DeGeorge,* 71 S.Ct. 703, the Court reiterated this concept and held:

> "We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. United States v. Wurzback 1930, 280 U.S. 396, 399, 50 S.Ct. 167, 168, 74 L.Ed. 508. *Impossible standards of specificity are not required. United States v. Petrillo,* 1947, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1977. The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Connally v. General Construction Co.,* 1926, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322. (Emphasis added)

In an illustrative vein, we would call to the Court's attention the following Federal statute analytically comparable to the one in issue:

> "18 U.S. Code 1461. Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device or substance; and every article or thing designed, adopted or intended for producing abortion, or for any indecent or immoral use: * * * "

The Honorable District Court in the case at bar would apparently, under the reasoning expressed in the injunction and memorandum in issue, hold that the above Federal statute is "overbroad and vague" and that it

could be used by Federal authorities to harass honest business persons. However, in *Hamling v. United States,* 94 S.Ct. 2887 (1974), the Supreme Court held that the generally worded Federal statute is valid and not unconstitutionally vague. Likewise, the County Regulations and statute in issue are patently valid.

This honorable court has embraced the concepts set out in the above stated authorities as quoted in the case of *United States v. Mikelburg,* 517 F.2d 246, (5th Circuit 1975, Rehearing Denied, 1975) saying that:

> *"The strong presumptive validity* that attaches to an act of Congress has led the Supreme Court to hold many times that statutes are not automatically invalidated as vague "simply because difficulty is found in determining whether certain marginal offenses fall within their language. Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation', *United States v. National Dairy,* 372 U.S. 29, 32, 83 S.Ct. 594, 597, 9 L.Ed.2d 561 (1962) (citations omitted). In *Bell v. United States,* 349 U.S. 81, 75 S.Ct. 620, 99 L. Ed. 905 (1955), *the Supreme Court pointed out that the rule of lenity in the construction of a penal code 'in no wise implies that language used in criminal statutes should not be read with a saving grace of common sense with which other enactments, not cast in technical language are to read.* Nor does it assume that offenders against the law carefully read the penal code before they embark on crime' ". (Emphasis added)

As our final authorities on the issue of alleged vagueness, Respondents cite *Colten v. Commonwealth of Kentucky,* 407 U.S. 104, 32 L.Ed.2d 584, 92 S.Ct. 1953 (1972) and *United States v. Mazurie,* 419 U.S. 544, 42

L.Ed.2d 706, 95 S.Ct. 710. In the *Colten* case this Court stated as follows:

> "Neither are we convinced that the statute is impermissibly vague or broad. We perceive no violation of '[t]he underlying principle . . . that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' *United States v. Harris,* 347 U.S. 612, 617, 98 L.Ed. 989, 996, 74 S.Ct. 808 (1954); cf. *Connally v. General Construction Co.,* 269 U.S. 385, 391, 70 L.Ed. 322, 328, 46 S.Ct. 126 (1926). Here the statute authorized conviction for refusing to disperse with the intent of causing inconvenience, annoyance or alarm. Any person who stands in a group of persons along a highway where the police are investigating a traffic violation and seeks to engage the attention of an officer issuing a summons should understand that he could be convicted under subdivision (f) of Kentucky's statute if he fails to obey an order to move on. The root of the vagueness doctrine is a rough idea of fairness. *It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.* We agree with the Kentucky court when it said:
>
> "We believe that citizens who desire to obey the statute will have no difficulty in understanding it. . . ." *Colten v. Commonwealth,* 467 S.W.2d, at 378. (Emphasis added)

In conclusion, we feel the vagueness doctrine with all of its various aspects has been well stated in Headnote (3) concerning the above quoted passage from *Colten* stating as follows:

> "The vagueness doctrine, whose root is a rough idea of fairness is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."

In the recent case of *United States v. Mazurie,* supra, in ruling on the meaning of the term of Indian Country contained in 18 U.S.C. § 1154 the Court held as follows:

> "We believe that the Court of Appeals erred by holding that the Constitution requires proof of such precisely defined concepts. The prosecution was required to do no more than prove that the Blue Bull was not located in a non-Indian community, where that term has a meaning sufficiently precise for a man of average intelligence to 'reasonably' understand that his contemplated conduct is proscribed." *United States v. National Dairy Products Corp.,* 372 U.S., at 32-33, 83 S.Ct., at 598. Given the nature of the Blue Bull's location and surrounding populations, the statute was sufficient to advise the Mazuries that their bar was not excepted from tribal regulations by virtue of being located in a non-Indian community."

See also *United States v. Powell,* 423 U.S. 87, 46 L.Ed. 2d 228, 96 S.Ct. 316 (1975).

In addition to our argument that the definitions in question are not unconstitutionally vague, we refer the Court to one of the cardinal rules of statutory construction, ejusdem generis. Judge Singleton clearly ignored this doctrine as is seen in the examples he sets forth for businesses which he argued might fall within

the definition of "Sexually Oriented Commercial Enterprises". Said doctrine mandates that general words following an enumeration of specific things will be confined to things of the same class. The general words *are not* to be construed in their widest sense, but are to be held as applying only to persons or things of the same kind and class as those enumerated. At this point it would be germane to quote Section 3(a) of Article 2372w from which definition 4(1) in the "Regulations" was directly taken:

> "Section 3, (a) A county by Order of the Commissioners Court may adopt regulations restricting the location of *massage parlors, nude studios, modeling studios, love parlors, and other similar commercial enterprises whose major business is the offering of a service which is intended to provide sexual stimulation or sexual gratification to the customer.*" (the italicized language is identical to the term used in Section 4(1). (Interestingly enough the Court approved the foregoing language in the Statute while condemning the same language as being vague in the subject "Regulations.") (Emphasis added)

The doctrine of ejusdem generis is applicable to both civil and criminal statutes. *Stanford v. Butler,* 181 S.W. 2d 269 (Tex. Sup. Ct.); 53 Tex. Jur. 2d Sec. 155, 156 pp. 221-223. The Federal rule of construction is identical, *United States v. Powell,* 96 S.Ct. 316 supra. Other states also apply this doctrine in the same manner, *State of Wisconsin v. Givens,* 135 N.W.2d 780 (Sup. Ct. Wis., 1965) and *State of North Carolina v. Strickland,* 217 S.E. 758 (Ct. of App. N.C., 1975).

III.

THE FIFTH AMENDMENT IS NOT AN ISSUE IN THAT A PERMIT IS REQUIRED ONLY FOR THE ARGUABLY LEGAL ENTERPRISES SET FORTH IN THE REGULATIONS.

The "Fifth Amendment Privilege" problem mentioned in the Trial Court's footnote #2 is not appropriate. It is clear from the four corners of the enabling statute and the Regulations in issue that a permit is required *only for the facially legal enterprises* described, i.e. "massage parlor, nude studio, modeling studio, love parlor, etc." and certainly an applicant would never be admitting or arguably admitting the crime of "prostitution" by merely making application for the operation of the described enterprises.

A fundamental rule of statutory construction requires that a statute (or Regulation) be construed as a whole and that all parts be harmonized. Courts must view the law in question in its entirety. *Martin v. Sheppard,* 102 S.W.2d 1036 (Tex. Sup. Ct.); *State v. Standard Oil,* 107 S.W.2d 550 (Tex. Sup. Ct.); 53 Tex. Jur. 2d Sec. 160 "Statutes" "Construction as a whole" pp. 229-231. (Ample authorities cited).

The enabling statute, which was not stricken by the District Court says:

> "Section 6. This Act does not legalize anything prohibited under the Penal Code or other State law."

The Regulations themselves say:

> "Section 21. *Effect on State Law*
>
> "These Regulations do not legalize anything prohibited under the Penal Code or other State law."

The import of this language in the enabling statute and the Regulations is clear. No permits are granted for the operation of an already illegal enterprise, such as prostitution, soliciting, etc. An application for the apparently legal businesses described, as set forth in the Regulations, do not pose a Fifth Amendment problem or even the potential for such a problem.

CONCLUSIONS AND PRAYER

For at least 5 years thousands of Harris County residents have had to tolerate immoral urban filth of the worst sort. State and local governments have made significant efforts on a firm legal basis to manage the problem. However, some of the Federal Courts have been transformed by the sexually oriented front operations into useful instrumentalities, who have worked to shackle perfectly honest law enforcement efforts to reduce this growing evil. This case does not involve alleged police brutality or harrassment, or the problematic 1st Amendment rights of speech and press (pornography). It does involve an overly aggressive Federal Trial Court who is completely unwilling to allow the local criminal justice system to work as it should in this troublesome field.

The state laws in question created a viable regulatory system calculated primarily to remove the obvious nuisances from neighborhoods where people live, attend school and worship. Though the sex businesses involved had every right to challenge the validity of the new laws and regulations in *State Court* in the prosecutorial process, they chose rather to invoke Federal jurisdiction and hoodwink a Federal judicial officer. In the name of protecting the constitutional rights of the front operations, the Federal Trial court has enjoined local law enforcement

agencies for approximately *1 year*. When one understands that these cases *in no way* involve pornography (1st amendment—free speech and free press arguments), the wrongfully aggressive Federal interference becomes even more pronounced and more inexplicable. The case contains no novel issues to speak of, and in fact the Fifth Circuit settled all of the major constitutional issues involved some years ago. The County Attorney placed into evidence the number of prostitution convictions against many of the establishments, so the Court cannot claim that the totality of the facts have not been adduced. The Plaintiff establishments are proven crime vectors and are a continuing threat to the area's health, safety and morals.

We cannot, even as officers of the Federal Courts, explain to our local citizens the Federal rationale at the trial level in handling these cases. They are far too quick to enjoin, and far too slow in eventually understanding the law and local enforcement problems. Additionally, *the patent rights of the citizens involved to be free of the obvious nuisances and urban blight are totally ignored in deference to the hypocritical, venal pleas of "rights violations" by the lawbreakers.*

Sheriff Jack Heard and District Attorney John Holmes assert that the Honorable District Court was quite wrong in its conclusions that Sections 4(k) and 4(l) of the new Harris County Regulations are void and unenforceable. The 5th Circuit was correct in all ways germane to the cause at bar.

The definition of "school" in Section 4(k) is quite broad, but such parameters are well within the legislative discretion granted local governmental units pursuant to

general police powers. The Honorable Trial Court's negative reflections go solely to the *wisdom* of the said broad definition and certainly the wording is not facially arbitrary and capricious nor arbitrary and capricious in light of the evidence adduced.

Again it is true that the definition of "Sexually Oriented Commercial Enterprise" is broad, but in light of the history of the serious problems in the State of Texas in this field, the State and local governments ". . . must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." (*Young v. American Mini Theatres,* 96 S.Ct. 2440, cited above). Certainly it is elementary in the field of legislative drafting that remedial statutes, enacted to address a complex problem as at bar, *must* be general and all encompassing. *Many, many hours* of hard work and thought went into the legislative drafting efforts, and the Honorable District Court's reflections that "more care" could have been given are inappropriate, though possibly intended as a helpful overview.

The pertinent sections are not "vague and indefinite" as stated by the Trial Court and in fact the drafting strategy chosen is quite similar to successful Federal efforts in the field as cited in the Brief.

The Regulations are wholly valid and the Trial Court's yet outstanding permanent injunction should be dissolved forthwith and the Respondent Sheriff and District Attorney discharged therefrom. It is essential that those officers be allowed to proceed with law enforcement on a firm basis and that the doctrine of Federal - State comity be upheld.

Wherefore, Premises Considered, the requested Writ of Certiorari should be in all ways *Denied* and the lower Court's decision *Affirmed*, with the exception of footnote 10 thereof.

Respectfully submitted,

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Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this instrument and all related materials was mailed to opposing counsel, Hon. Stanley G. Schneider, 2225 LaBranch, Houston, Texas 77002 on this the 19th day of September, 1980.

ANTHONY D. SHEPPARD
Senior Assistant County Attorney

APPENDIX

FINAL JUDGMENT OF THE TRIAL COURT, FEDERAL DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HONORABLE JOHN V. SINGLETON, PRESIDING (WITHOUT APPENDICES)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 79-2092

JESSIE STANSBERRY, ET AL
v.
JOHN HOLMES, ET AL

FINAL JUDGMENT

In accordance with the Memorandum Opinion entered on this date, it is ORDERED, ADJUDGED, and DECREED that §§ 4(k) and (l) of the Regulations of Harris County Texas for Certain Sexually Oriented Commercial Enterprises violate the due process component of the Fourteenth Amendment. Accordingly their enforcement is hereby permanently enjoined.

The clerk is directed to file this Final Judgment and to send copies of the Memorandum Opinion and Final Judgment to counsel of record.

DONE at Houston, Texas, on the 26th day of October, 1979.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-79-2092

JESSIE STANSBERRY, ET AL

v.

JOHN HOLMES, ET AL

MEMORANDUM OPINION AND ORDER

The constitutionality of Tex. Rev. Civ. Stat. Ann. art. 2372w and the Regulations of Harris County, Texas for the Location of Certain Sexually Oriented Commercial Enterprises has been called into question by the plaintiffs.

The Enabling Act, Art. 2372w, H.B. 654, is attached as Appendix A.

Pursuant to this bill the Commissioners Court adopted the regulations attached as Appendix B.

The court has considered all of the numerous arguments and briefs on both sides and has concluded that the definition of "school" in Section 4(k) and "Sexually Oriented Commercial Enterprise" in Section 4(l) of the County Regulations[1] is unconstitutionally vague.

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1. Although H.B. 654, the Enabling Act, initially defined the enterprises subject to regulation in this way, it is not therefor unconstitutional. Regulations adopted by cities or counties may narrow this broad definition and thus the Act will permit the adoption of valid regulations. See *McCarthy v. Jones,* 449 F. Supp. 480 (S.D. Ala. 1978). For further discussion see Judge Bue's opinion in *Harper, et al. v. Jon Lindsay, et al.,* C.A. 77-1435 consolidated with 77-1464, pp. 11-13.

The evidence presented at the hearing on the application for permanent injunction was persuasive that there presently exists outside of the incorporated limits of the city of Houston and within Harris County, commercial enterprises advertised as modeling studios, etc., which enterprises engage in activities that could, and in some instances did, result in convictions for prostitution. Also, the four "studios" actually involved as plaintiffs here are located within 1500 feet of residential areas or other places the legislature found to be inconsistent with the operation of a massage parlor.

The Texas Penal Code provides for indictment and prosecution for prostitution. Section 43.01 et seq. In addition, the legislature and the Commissioners Court have the power to regulate the location of commercial enterprises that affect the health, safety, welfare, and morals of the community. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). However, this must be done within constitutional limits. One of these limits is that the statute must give clear notice to the citizens regarding the scope of the law, so that they may act lawfully with respect thereto.

In *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972) the Supreme Court struck down a Florida Statute because the legislature failed to adequately define the conduct it sought to regulate. The Court stated:

> "This ordinance is void for vagueness, both in the sense that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute . . . and because it encourages arbitrary and erratic arrests and convictions."

p. 162.

This explanation of the void-for-vagueness aspect of due process has been consistently followed by the federal courts. See *Grayned v. City of Rockford,* 408 U.S. 104 (1972) and cases cited in FN's 3-5 pp. 108 & 109.

The ordinance under attack here, particularly Section 4(1) defining "sexually oriented commercial enterprises" is so vague and at the same time overbroad in its sweep that the police power may be used to harass perfectly legitimate commercial enterprises that engage in activities that may sexually stimulate the patrons or customers such as dancing studios, clubs featuring disco dancing or art schools where nude models are used.[2]

Therefore, this definition as written could be a tool in the hands of overzealous enforcement officers and prosecutors. More careful attention in drafting by the Commissioners Court would allow effective regulation of the commercial enterprises which the legislature deter-

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2. An additional consideration with respect to the current definition of "Sexually Oriented Commercial Enterprise" is its possible conflict with the Fifth Amendment privilege against self-incrimination. The crux of the definition as now written is a service "intended to provide sexual stimulation or sexual gratification . . ." The Texas Penal Code § 43.02 defines the crime of prostitution as knowingly offering to engage or soliciting another to engage in an act which involves (1) contact between the genitals of one person and the mouth or anus of another person, (2) any touching of the anus or any part of the genitals of another person or of the breast of a female 10 years or older with intent to arouse or gratify the sexual desire of any person or (3) penetration of the female sex organ by the male sex organ. The definition in § 4(l) of the County Regulations includes the definition just given of prostitution. Thus, any person who admits that they are a sexually oriented commercial enterprise as defined in § 4(l) by applying for a permit admits in effect that they are violating § 43.02 making prostitution a crime. For the Fifth Amendment conflict see *Marchetti v. United States,* 390 U.S. 39 (1977) and cases decided subsequent thereto.

mines contributes to the crime rate and lowers property values.

In addition the definition of school is not clearly defined. Section 4(k) provides: "School means a building where persons regularly assemble for the purpose of instruction or education . . ." It is unclear whether this Section means schools where school children attend daily from September to May or all buildings where information of any type is disseminated. For example, are karate schools, bartending schools and buildings where Dale Carnegie courses, t'ai ch'i dancing or hypnotism is taught intended to fall within Section 4(k)? If so there may be some question as to whether the means used in the statute are rationally related to the end the legislature stated in the Enabling Act. The lack of precision in this definition becomes even more marked when compared to the definition of hospital. Section 4(f) provides: "Hospital means a building used to provide health services for human in-patient medical care for the sick or injured licensed pursuant to the Texas Hospital Licensing Law (Article 4437f Vernon's Texas Civil Statutes) or operated by an agency of the federal government, or a convalescent facility licensed pursuant to Article 4442c, Vernon's Texas Civil Statutes." This definition provides the certainty required for persons to know what the parameters of the statute are. The definition of "school" does not provide this certainty and thus cannot stand.

For the foregoing reasons it is hereby ORDERED, ADJUDGED, and DECREED that §§ 4(k) and (l) of the Regulations of Harris County Texas for Certain Sexually Oriented Commercial Enterprises violate the due process component of the Fourteenth Amendment. Ac-

cordingly their enforcement is hereby permanently enjoined.

DONE this 26th day of October, 1979.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

TRANSMITTAL OF THE OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS AS THE JUDGMENT AND MANDATE OF THAT COURT

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

Gilbert F. Ganucheau
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, La 70130

June 3, 1980

Mr. Jesse E. Clark, Clerk
U. S. District Court
P. O. Box 61010
Houston, TX 77208

NO. 79-3606—JESSIE STANSBERRY, ETC. v.
JOHN HOLMES, ETC., ET AL.

(Dist. Ct. No. CA-79-2092)

Dear Mr. Clark:

Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

Enclosed herewith are the following additional dccuments:

Copy of the Court's opinion.

Original record on appeal or review.)
)To be Returned Later

Original exhibits.)

Bill of Costs approved by this Court.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By /s/ BRENDA HAUCK
Deputy Clerk

Jessie STANSBERRY d/b/a Universal Studio et al.,
Plaintiffs-Appellees,

v.

John HOLMES, Harris County District Attorney,
Jack Heard, Sheriff of Harris County, Texas,
each in their official capacities,
Defendants-Appellants.

No. 79-3606.

UNITED STATES COURT OF APPEALS
Fifth Circuit.

April 28, 1980.

Appeal from the United States District Court
for the Southern District of Texas;
John V. Singleton, Jr., Judge.

AMENDED ORDER

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion 3-17-80, 5 Cir., 1980, 613 F.2d 1285).

Before TUTTLE, FAY and THOMAS A. CLARK, Circuit Judges:

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the

Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

The Court, *sua sponte,* adds the following language to footnote 10:

> We do not reach questions arising under this provision of the Constitution because since appellees prevailed on their due process claim, they did not urge this point before us. It remains open on remand to the district court.

Jessie STANSBERRY d/b/a Universal Studio et al.,
Plaintiffs-Appellees,

v.

John HOLMES, Harris County District Attorney,
Jack Heard, Sheriff of Harris County, Texas,
each in their official capacities,
Defendants-Appellants.

No. 79-3606.

UNITED STATES COURT OF APPEALS
Fifth Circuit.

March 17, 1980.

The United States District Court for the Southern District of Texas at Houston, John V. Singleton, Jr., Chief Judge, permanently enjoined enforcement of county regulations dealing with zoning of certain sexually oriented commercial enterprises. On appeal by county officers, the Court of Appeals, Tuttle, Circuit Judge, held that the regulations were not invalid as violative of constitutional rights of free speech nor were the regulations objectionable as being unconstitutionally vague and overbroad.

Judgment reversed and case remanded.

* * *

Appeal from the United States District Court
for the Southern District of Texas

Before TUTTLE, FAY and THOMAS A. CLARK, Circuit Judge.

TUTTLE, Circuit Judge:

This case involves an appeal from a district court's order permanently enjoining the enforcement of Regula-

tions §§ 4(k) and (*l*) of the Regulations of Harris County, Texas dealing with the zoning of certain sexually oriented commercial enterprises. We reverse the decision of the trial court.

For a number of years Texas municipalities have sought to regulate the location or operation of sexually oriented businesses.[1] Faced with the problem of many of those businesses moving outside city limits, in May 1979 the Texas Legislature enacted enabling acts 2372v and w authorizing the commissioners court of any county to adopt regulations in the unincorporated territory of the county governing the operation of massage establishments and the location "of massage parlors, nude studios, modeling studios, love parlors, and other similar commercial enterprises whose major business is the offering of a service which is intended to provide sexual stimulation or sexual gratification to the customer." [See Appendix A].

Pursuant to that authority, the Commissioners Court of Harris County, Texas in September 1979 adopted regulations restricting the location of certain sexually oriented commercial enterprises, to be effective in October 1979. [See Appendix B]. In part, the regulations made it unlawful for any person to operate a sexually oriented commercial enterprise without a valid permit issued by the sheriff and stated that no permit could be issued unless the applicant could show that the enterprise was at least 1500 feet from a child care facility, a church or

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1. *See, e. g., Patterson v. City of Dallas,* 355 S.W.2d 838 (Tex. Civ. App. 1962), *appeal dismissed,* 372 U.S. 251, 83 S.Ct. 873, 9 L.Ed.2d 732 (1963) (Dallas); *City of Houston v. Shober,* 362 S.W.2d 886 (Tex. Civ. App. 1962) (Houston); *Holt v. City of San Antonio,* 547 S.W.2d 715 (Tex. Civ. App. 1977) (San Antonio).

place of worship, a dwelling, public building or public park, school, hospital or a building in which alcohol was sold. A "sexually oriented commercial enterprise" was defined as a "masage parlor, nude studio, modeling studio, love parlor and any other similar commercial enterprise whose major business is the offering of a service which is intended to provide sexual stimulation or sexual gratification to the customer." The regulations specifically exempted any bookstore, movie theatre or business licensed to sell alcoholic beverages; any business operated by or employing licensed psychologists, licensed physical theapists, licensed athletic trainers, cosmetologists or barbers; or any business employing or operated by licensed physicians or licensed chiropractors.

The penalty for non-compliance with the regulation was a penal sanction, a class B misdemeanor,[2] and the operation of any such sexually oriented commercial enterprise without a permit was declared a public nuisance.

On October 10, 1979, the plaintiffs filed suit challenging the ordinance under 42 U.S.C. §§ 1981, 1983, 1985, and 1986. They charged, among other things, that the Texas Act as applied through this local ordinance constituted the taking of property without due process or compensation; that the Act and ordinance were unconstitutionally vague; and that the Act and ordinance violated the First Amendment and the Due Process Clause of the Fourteenth Amendment. The trial court granted a temporary restraining order. After a hearing on the merits, the trial court entered an order decreeing that the definitions of "school" in section 4(k) and "sexually

2. According to § 12.22 of Vernon's Texas Code Annotated-Penal (1974), a class B misdemeanor is punishable by a fine not exceeding $1,000 and a jail sentence not exceeding 180 days.

oriented commercial enterprise" in section 4(*l*)[3] were unconstitutionally vague and overbroad. Specifically, the court found that the definition of "sexually oriented commercial enterprise" could encompass such businesses as art schools and dancing studios which the court described as "perfectly legitimate commercial enterprises." The court also pointed out that the definition of "school" was unclear since the definition might apply to such enterprises as bartending or Karate schools. The trial court also stated that the regulations "possibly" violated the Fifth Amendment privilege against self-incrimination, since any people who admitted that they operated a sexually oriented commercial enterprise as defined in § 4(*l*), admitted in effect that they were violating § 43.02 of the Texas Penal Code which makes prostitution a crime.[4] The trial court therefore granted a permanent injunction prohibiting enforcement of §§ 4(k) and (*l*) of the regulations of Harris County. This appeal followed.[5]

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3. Section 4(k) states:

> "School" means a building where persons regularly assemble for the purpose of instruction or education together with the playgrounds, dormitories, stadiums, and other structures or grounds used in conjunction therewith;

Section 4(*l*) states:

> "Sexually oriented commercial enterprise" means a massage parlor, nude studio, modeling studio, love parlor and any other similar commercial enterprise whose major business is the offering of a service which is intended to provide sexual stimulation or sexual gratification to the customers.

4. Texas Penal Code § 43.02 defines the crime of prostitution as knowingly offering to engage or soliciting another to engage in an act which involves (1) contact between the genitals of one person and the mouth or anus of another person, (2) any touching of the anus or any part of the genitals of another person or the breast of a female 10 years or older with intent to arouse or gratify the sexual desire of any person or (3) penetration of the female sex organ by the male sex organ.

5. The court apparently found no merit in the other arguments of the plaintiffs. The order states that the enabling act is constitu-

The appellants assert initially that the case does not contain any First Amendment issues, but involves rather an exercise of the state's police power through zoning.[6] Since the regulations were tailored to avoid any effect on speech protected by the First Amendment, they contend that the regulations must be analyzed by the standard traditionally applied to zoning regulations—whether the regulations are arbitrary and unreasonable, having no rational relationship to a legitimate governmental interest. *See Stone v. City of Maitland,* 446 F.2d 83, 87 (5th Cir. 1971). The appellants then argue that the district court erred in holding that the definitions of "school" and "sexually oriented commercial enterprise" are vague and overbroad.

The appellees assert that the regulations are, as found by the trial court, vague and overbroad, failing to define the terms "school" and "sexually oriented commercial enterprise" so that a person of ordinary intelligence has fair notice of the conduct that is proscribed. They also contend that the regulations conflict with an individual's Fifth Amendment right against self-incrimination because of the similarity between the definition of a sexually oriented commerical enterprise and the Texas Penal Code's

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tional, and cites an opinion holding that the Harris County massage parlor regulations are a constitutional exercise of the police power. *See Magdalene Harper v. John Lindsay,* No. 77-1435 (S.D. Tex., May 31, 1978).

6. Several of the cases relied upon by the district court involved regulations affecting speech protected by the First Amendment. *See Young v. American Mini Theatres,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, *rehearing denied,* 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed. 2d 155 (1976); *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The appellants are apparently concerned that the court might apply the stricter standards applicable to cases involving protected speech.

definition of prostitution. *See* Texas Penal Code § 43.02, *supra* note 4.

I.

[1] It is important to note at the outset that the regulations in question do not attempt to zone businesses such as bookstores or movie theatres, which fall within the protection of the First Amendment. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, *rehearing denied*, 429 U.S. 813, 97 S.Ct. 191, 50 L.Ed.2d 155 (1976), the Supreme Court held that "adult" theatres may be subject to municipal zoning regulations, despite the traditional rule that expression may not be classified on the basis of content. 427 U.S. at 72-73, 96 S.Ct. at 2453. Although *Young* affords certain "speech" activities lesser protection than under traditional First Amendment principles, it nonetheless requires a more stringent review than is applicable to regulations zoning conduct not protected under the First Amendment. *See id.;* Note, Developments in the Law—Zoning, 91 Harv. L. Rev. 1427, 1560 (1978). However, no First Amendment interests are at stake here; we therefore analyze the provisions by the traditional standards applicable to zoning regulations.

II.

[2] If the district court, in calling the ordinance "overbroad" and "vague" means that this ordinance is beyond the police power, it is certainly mistaken. In our age, zoning has become "the predominant technique by which governments . . . [exercise] . . . control over private property." Note, Developments in the Law—Zoning, 91 Harv. L. Rev. 1427, 1429 (1978). With

the rapid development of a highly urban and industrialized society, the importance of zoning as a form of land use control has increased. The past decade has seen a growing popular acceptance of the notion that infinite uncontrolled growth often produces the unsightly sprawl that threatens to turn every major street into a neon commercial carnival.

The Supreme Court has recognized the key role that the zoning power can play in maintaining for citizens an acceptable quality of life. Zoning is the local community's most powerful weapon against a wave of commercialism that threatens to permeate not only the major thoroughfares but the quiet residential neighborhoods with their parks, trees, and children at play. Without the power to zone, every person would be at the mercy of the entrepeneur who chose to develop on the next corner. Zoning provides one of the firmest and most basic of the rights of local control. Since 1928, the Supreme Court has never held that a zoning measure exceeded the police power.[7] In *Berman v. Parker,* 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954), the Court held that land use regulations may promote "values [which] are spiritual as well as physical, aesthetic as well as monetary." In *Village of Bele Terre v. Boraas,* 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797 (1974), the Court said that zoning could be used to create and

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7. Some might consider an exception to be *Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), a recent case which involved a city single-family ordinance which created a very limited definition of what constituted a family. The ordinance was struck down by a plurality on the grounds that it chose "to regulate the occupancy of its housing by slicing deeply into the family itself." *Id.* at 498, 97 S.Ct. at 1935. That case thus struck the statute down, not because it exceeded the police power, but because it was too narrowly drawn. *See* Developments, p. 1443.

promote living areas that protect "family values [and] youth values." Given these pronouncements and the importance of zoning as an instrument of community control over private property, this Court has decided that the proper standard of review of zoning ordinances is limited to the question "whether the action . . . is arbitrary and capricious, having no substantial relation to the general welfare." *South Gwinnet Venture v. Pruitt,* 491 F.2d 5, 7 (5th Cir. 1974), *cert. denied,* 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974). *See also, Blackman v. City of Big Sandy, Texas,* 507 F.2d 935 (5th Cir. 1975).[8] The requirements of procedural due process also must be observed,[9] and a zoning decision cannot violate the Fifth Amendment which says that "private property [shall not] be taken for public use, without just compensation."[10]

[3] In this case, the zoning measures at issue clearly overcome the "arbitrary and capricious" standard. Not only were the State of Texas and Harris County's regulations not arbitrary and capricious, they were a rational and understandable effort to deal with a perceived evil that affected living conditions in their area. Nor was the county under a "compulsion to deal with all other

8. We do not address, of course, in this opinion recent cases that attack the clear inequities promulgated by socially or class-oriented exclusionary zoning, nor do we endorse such a narrow standard of review in such cases. For an example of the attempts of recent state courts to grapple with the issue, *see Surrick v. Zoning Hearing Bd. of U. Providence Tp.,* 476 Pa. 182, 382 A.2d 105 (1977); *Southern Burlington County NAACP v. Township of Mt. Laurel,* 67 N.J. 151, 336 A.2d 713, *appeal dismissed,* 423 U.S. 808, 96 S.Ct. 18, 46 L.Ed.2d 28 (1975).

9. *See* Note, Developments in the Law—Zoning, 91 Harv. L. Rev. 1427, 1502-1549.

10. *See Ibid.,* pp. 1462-1502.

evils that are seen to be equally serious" in the same or other ordinances to pass the test of constitutionality. *See Stone v. City of Maitland,* 446 F.2d 83, 88 (5th Cir. 1971). The county clearly had the power to make the judgment it did in this case in an attempt to insure a more aesthetic quality of life for its people.

[4-6] We also disagree with the district court's finding that the terms "school" and "sexually oriented commercial enterprise" are impermissibly vague. Any statute or ordinance which proscribes certain conduct must be sufficiently definite to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," and to avoid the possibility of arbitrary and erratic arrests and convictions. *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1971). A provision need not, however, be cast in terms that are mathematically precise; it need only give fair warning of the conduct proscribed, in light of common understanding and practices. *Grayned v. City of Rockford,* 408 U.S. 104, 110, 92 S.Ct. 2294, 2300, 33 L.Ed.2d 222 (1971); *United States v. National Dairy Products Corp.,* 372 U.S. 29, 32, 83 S.Ct. 594, 597, 9 L.Ed.2d 561 (1963); *United States v. Mikelburg,* 517 F.2d 246, 252 (5th Cir. 1975), *cert. denied,* 424 U.S. 909, 96 S.Ct. 1104, 47 L.Ed.2d 313 (1976). The district court found that the definition of "school" was vague because it could possibly include "Karate schools, bartending schools, and buildings where Dale Carnegie courses, t'ai, ch'i' dancing or hypnotism [are] taught." We disagree. The reference in the provision to "the playgrounds, dormitories, stadiums and other structures or grounds used in conjunction therewith" clearly narrows the definition to schools for pri-

mary, secondary, and college education. The definition, read as a whole, provides the necessary measure of certainty and is not unconstitutionally vague. The district court also held that section 4(*l*) defining "sexually oriented commercial enterprise" was "so vague and at the same time overbroad in its sweep that the police power might be used to harass perfectly legitimate commercial enterprises that engage in activities that may sexually stimulate the patrons or customers such as dancing studios, clubs featuring disco dancing or art schools where nude models are used." We do not agree with the trial court's reading of the definition. The definition is limited to businesses "whose *major business* is the offering of *a service which is intended* to provide sexual stimulation or sexual gratification." (Emphasis added.) By including the phrase "major business," the county commissioners have excluded businesses whose activities might incidentially cause sexual stimulation. Certainly no one would contend that the major business of an art school or dance studio was the provision of services intended for sexual gratification. Additional definiteness is provided by the fact that the section specifically list three types of regulated businesses—massage parlors, nude studios, and love parlors—and applies the definition to "any other similar commercial enterprise." We find that this definition is sufficiently clear and provides adequate warning of the proscribed conduct.

[7] The district court also noted that the regulations possibly conflict with the Fifth Amendment right against self-incrimination because of the similarity between the definition of sexually oriented commercial enterprise and prostitution. The court cites *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1967) as

an indication of this conflict. In *Marchetti,* the Court held that a taxpayer could not be prosecuted for willful failure to report income from wagering, since wagering is prohibited by both state and federal law. *Id.* at 60-61, 88 S.Ct. at 709. The direct self-incrimination present in *Marchetti* is not, however, present in the instant case. The definition of "prostitution" is very narrow and specifically drawn. Although a "business" whose major purpose is the provision of a service intended to provide sexual stimulation or gratification" would certainly include prostitution, the two are not synonymous. The definition in section 4(*l*) encompasses a much broader range of conduct. Thus, application for a permit under these regulations would in no way constitute an admission that an individual was engaged in prostitution.

The judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX A

[Texas House Bill No. 654, Codified as Article 2372w, V.A.C.S.]

An Act

relating to the authority of cities and counties to regulate the location of certain sexually oriented commercial activities; providing penalties.

Be it enacted by the Legislature of the State of Texas:

Section 1. (a) The legislature finds that the unrestricted location of certain sexually oriented commercial enterprises may be detrimental to the public health, safety, and welfare by contributing to the decline of residential

and business neighborhoods and the growth of criminal activity. The purpose of this Act is to provide local governments a means of remedying this problem.

(b) This Act neither enhances nor diminishes the authority of local governments to regulate commercial enterprises covered by this Act with regard to matters other than their location.

Sec. 2. In this Act "city" means an incorporated city, town, or village and includes a home-rule city.

Sec. 3. (a) A city by ordinance or a county by order of the commissioners court may adopt regulations restricting the location of massage parlors, nude studios, modeling studios, love parlors, and other similar commercial enterprises whose major business is the offering of a service which is intended to provide sexual stimulation or sexual gratification to the customer.

(b) Nothing in this Act is intended to authorize the regulation of any bookstore, movie theatre, or business licensed to sell alcoholic beverages, nor does it authorize regulation of any business:

(1) operated by or employing licensed psychologists, licensed physical therapists, licensed athletic trainers, licensed cosmetologists, or licensed barbers engaged in performing functions authorized under the license held; or

(2) operated by or employing licensed physicians or licensed chiropractors engaged in practicing the healing arts.

(c) City regulations apply only inside the city's corporate limits. County regulations apply only to the parts of the county outside the corporate limits of a city.

Sec. 4. (a) Regulations adopted under this Act may restrict the location of regulated enterprises to particular areas, restrict the density of regulated enterprises, or prohibit the operation of a restricted enterprise within a certain distance of a school, regular place of religious worship, residential neighborhood, or other specified land use the governing body of the city or county finds to be inconsistent with the operation of a restricted establishment.

(b) The city or county may require the obtaining of a permit for the operation of a restricted establishment. The city or county may charge a fee for the permit, but the fee may not exceed the actual cost of processing the permit application.

(c) A city that has in effect a comprehensive zoning ordinance adopted under Chapter 283, Acts of the 40th Legislature, Regular Session, 1927, as amended (Article 1011a, et seq., Vernon's Texas Civil Statutes), must comply with all applicable procedural requirements of that statute in adopting regulations under this Act within the scope of that statute.

Sec. 5. (a) A city or county may sue in the district court to enjoin the violation of a regulation adopted under this Act.

(b) Violation of a county regulation adopted under this Act is a Class B misdemeanor.

(c) In a city that has a comprehensive zoning ordinance as described in Subsection (c), Section 4, of this Act, a violation of an ordinance adopted under this Act is punishable by the same penalty prescribed for a violation of the zoning ordinance. In all other cities, violation

of an ordinance adopted under this Act is a Class B misdemeanor.

Sec. 6. This Act does not legalize anything prohibited under the Penal Code or other state law.

Sec. 7. If any provision of this Act or its application to any person or circumstances is held invalid for any reason, the invalidity does not affect any other provision or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Sec. 8. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

APPENDIX B

REGULATIONS OF HARRIS COUNTY, TEXAS FOR THE LOCATION OF CERTAIN SEXUALLY ORIENTED COMMERCIAL ENTERPRISES

Section 1. *Authority*

These Regulations are adopted by the Commissioner's Court of Harris County, Texas, acting in its capacity as the governing body of Harris County, Texas. Authority of Harris County to adopt these Regulations is House Bill No. 654, enacted by the 66th Legislature of the State of Texas and signed by the Governor on or about May 17, 1979.

Section 2. *Administration*

The Commissioners' Court hereby designates the Sheriff to inspect and issue permits pursuant to the above authority. The administration of these Regulations including but not limited to issuance of permits and inspections hereunder, shall be performed by the Sheriff or his duly authorized deputy. Any peace officer certified by the State of Texas may enforce these Regulations.

Section 3. *Area Covered By Regulations*

These Regulations apply only to the parts of the county outside the corporate limits of a city.

Section 4. *Definitions*

As used in these Regulations:

(a) "Commissioners' Court" means the Commissioners' Court of Harris County, Texas;

(b) "County" means Harris County, Texas;

(c) "Church or place of religious worship" means a building in which persons regularly assemble for worship, intended primarily for purposes connected with faith, or for propogating a particular form of belief;

(d) "Child Care Facility" means a building used as a day nursery, children's boarding home, child placing agency or other place for the care or custody of children under fifteen years of age, licensed by the State of Texas pursuant to Article 4442a, Vernon's Texas Civil Statutes;

(e) "Dwelling" means a house, duplex, apartment,

townhouse, condominium, mobile home or any other building used for residential purposes;

(f) "Hospital" means a building used to provide health services for human in-patient medical care for the sick or injured licensed pursuant to the Texas Hospital Licensing Law (Article 4437f Vernon's Texas Civil Statutes) or operated by an agency of the federal government, or a convalescent facility licensed pursuant to Article 4442c, Vernon's Texas Civil Statutes;

(g) "Person" means an individual, partnership, corporation, or other entity;

(h) "Public Building" means a building used by federal, state, or local government and open to the general public;

(i) "Public Park" means a tract of land maintained by the federal, state, or local government for the recreation and enjoyment of the general public;

(j) "Regulations" means Regulations of Harris County, Texas, for the Location of Certain Sexually Oriented Commercial Enterprises;

(k) "School" means a building where persons regularly assemble for the purpose of instruction or education together with the playgrounds, dormitories, stadiums, and other structures or grounds used in conjunction therewith;

(*l*) "Sexually Oriented Commercial Enterprise" means a massage parlor, nude studio, modeling studio, love parlor and any other similar commercial enterprise whose major business is the offering of a

service which is intended to provide sexual stimulation or sexual gratification to the customer;

(m) "Sheriff" means the Sheriff of Harris County, Texas;

(n) "State" means the State of Texas;

(*o*) "City" means an incorporated city, town, or village and includes a home-rule city.

Section 5. *Bookstores, etc. Excepted*

These Regulations do not apply to the following:

(a) Any bookstore, movie theatre, or business licensed to sell alcoholic beverages;

(b) Any business, operated by or employing licensed psychologists, licensed physical therapists, licensed athletic trainers, licensed cosmetologists, or licensed barbers performing functions authorized under the license held;

(c) Any business operated by or employing licensed physicians or licensed chiropractors engaged in practicing the healing arts.

Section 6. *Permit Required*

(a) It shall be unlawful for any person to own or operate a Sexually Oriented Commercial Enterprise at a location in the parts of the County outside the corporate limits of a city without a valid permit issued therefor by the Sheriff in accordance with the provisions of these Regulations.

(b) Before the issuance of a permit, the applicant must certify that the proposed Sexually Oriented

Commercial Enterprise will be located a minimum of 1500 feet from the following, which the Commissioners' Court hereby finds to be inconsistent with the operation of a restricted establishment, to-wit:

(1) A child care facility;

(2) A church or place of religious worship;

(3) A dwelling;

(4) A hospital;

(5) A building in which alcoholic beverages are sold;

(6) A public building;

(7) A public park;

(8) A school.

(c) Subsection (b) of this Section 6 will apply to all Sexually Oriented Commercial Enterprises regardless of whether or not existing on the effective date of these Regulations. However, should any Court determine that such requirement is unconstitutional or invalid insofar as it applies to Sexually Oriented Commercial Enterprises existing on the effective date of these Regulations, then and in that event, the applicant may certify that the Sexually Oriented Commercial Enterprise was in existence on the effective date of these Regulations in lieu of making the certification provided for in said Subsection (b). Provided, however, that any permit issued on the basis of an application making a certification pursuant to this subsection (c) in lieu of certification under subsection (b) shall

have written thereon "This permit is valid for only one (1) year from October 1, 1979."

(d) For the purposes of this section, measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used by the restricted establishment to the nearest portion of the building, structure, or facility set forth in subsection (b).

Section 7. *Permit Displayed*

A Sexually Oriented Commercial Enterprise permit issued under these Regulations shall be displayed at all times in an open and conspicuous place in the restricted establishment for which it was issued.

Section 8. *Permit Application*

Any person desiring a Sexually Oriented Commercial Enterprise permit shall file a written application with the Sheriff on a form to be prescribed by him.

(a) The application shall set forth the following:

(1) The name of the applicant and whether the applicant is an individual, general partnership, limited partnership, corporation or other entity;

(2) The name under which the restricted establishment is to be operated and a general description of the service to be provided;

(3) The address and a full legal description of the parcel of land on which the restricted establishment is to be located;

(4) The name, residence address and telephone number, if any, of the manager or other individual to be principally in charge of the operation of the restricted establishment;

(5) Written declaration that the information contained in the application is true and correct, said declaration being duly dated and signed in the County. If the applicant is an individual, the application shall be signed and sworn to by the applicant. If the applicant is a partnership, the application shall be signed and sworn to by a partner thereof. If the applicant is a corporation or other entity, the application shall be signed and sworn to by an authorized officer of such corporation or entity.

(b) The application shall be accompanied by the following:

(1) A tender of the correct permit fee as hereinafter provided;

(2) A certified copy of the assumed name certificate filed in compliance with the Assumed Business or Professional Name Act (Vernon's Texas Codes Annotated, Business and Commerce Code, Chapter 36) if the applicant is to operate the restricted establishment under an assumed name;

(3) A certified copy of the article of incorporation, together with all amendments thereto, if applicant is a Texas Corporation;

(4) A certified copy of the certificate of authority to transact business in this State, together with all amendments thereto, if applicant is a foreign corporation;

(5) A certified copy of the certificate of limited partnership, together with all amendments thereto, filed in the Office of the Secretary of State under The Texas Limited Partnership Act (Article 6132a, Vernon's Texas Civil Statutes), if the applicant is a limited partnership formed under the laws of Texas;

(6) A certified copy of the certificate of limited partnership and the qualification documents, together with all amendments thereto, filed in the office of the Secretary of State under the Texas Limited Partnership Act, if the applicant is a foreign limited partnership.

Section 9. *Investigation by Sheriff*

Upon receiving the application for a Sexually Oriented Commercial Enterprise permit, the Sheriff shall caused to be conducted an investigation for the purpose of determining whether or not such premises comply with the location requirements as set forth in these Regulations.

Section 10. *Issuance of Sexually Oriented Commercial Enterprise Permit*

(a) Any permit required by these Regulations shall be issued and signed by the Sheriff or his duly authorized deputy.

(b) The Sheriff shall issue a Sexually Oriented Com-

mercial Enterprise permit within thirty (30) days of receipt of the application unless he finds that:

(1) The correct permit fee has not been tendered to the Sheriff;

(2) The operation as proposed by the application is prohibited by law;

(3) The applicant has made any false, misleading or fraudulent statement of fact in the permit application or in any document required by these Regulations to accompany the application;

(4) The application or the establishment location does not meet all requirements of these Regulations.

Section 11. *Fees*

To defray the actual cost of processing the Sexually Oriented Commercial Enterprise permit application, the permit fee shall be One Hundred ($100.00) Dollars.

Section 12. *Return of Fee*

No portion of any fee collected under these Regulations shall be returned after a permit has been issued or refused.

Section 13. *Transfer Prohibited*

A Sexually Oriented Commercial Enterprise permit is not transferable, assignable or divisible.

Section 14. *Permit Valid for Specified Location*

Each permit issued under these Regulations shall be valid at the location therein specified, and not otherwise.

Section 15. *Obtaining Permit by Fraud*

It shall be unlawful for any person to knowingly make any false, fraudulent or untruthful statement, either written or oral, or in any way knowingly to conceal any material fact, or to give or use any assumed name or fictitious name other than one duly filed for record in compliance with the Assumed Business or Professional Name Act (Vernon's Texas Codes Annotated, Business and Commerce Code, Chapter 36).

Section 16. *Fraudulent Use of Permit of Another*

It shall be unlawful for any person to use a Sexually Oriented Commercial Enterprise permit which has been issued to another person.

Section 17. *Counterfeiting, Changing, Defacing Permit*

It shall be unlawful for any person to counterfeit, forge, change, deface, or alter a Sexually Oriented Commercial Enterprise permit.

Section 18. *Misdemeanor*

Violation of any provision of these Regulations is a Class B misdemeanor.

Section 19. *Nuisance*

The operation of a Sexually Oriented Commercial Enterprise without a Sexually Oriented Commercial Enterprise Permit is hereby declared to be a public nuisance.

Section 20. *Injunction*

The County may sue in District Court to enjoin the violation of any provision of these Regulations.

Section 21. *Effect on State Law*

These Regulations do not legalize anything prohibited under the Penal Code or other State Law.

Section 22. *Severability*

If any provision of these Regulations or its application to any person or circumstances is held invalid for any reasons, the invalidity does not affect any other provisions or application of these Regulations which can be given effect without the invalid provision or application, and to this end the provisions of these Regulations are declared to be severable.

Section 23. *Effective Date*

These Regulations shall become effective on the fifteenth day of October, 1979.

ORDER BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT *DENYING* PLAINTIFF APPELLEE'S MOTION FOR STAY PENDING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

IN THE UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 79-3606

JESSIE STANSBERRY d/b/a UNIVERSAL STUDIO, ET AL.,
Plaintiffs-Appellees,

v.

JOHN HOLMES, Harris County District Attorney,
JACK HEARD, Sheriff of Harris County, Texas,
each in their official capacities,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

ORDER:

The motion of Appellees for the stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

/s/ PETER P. FAY
United States Circuit Judge